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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARCHER-DANIELS-MIDLAND COMPANY
and NABISCO BRANDS, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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May 1986

QUESTIONS PRESENTED

In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), this Court held that Department of Justice attorneys in civil litigation, who did not participate in a prior grand jury criminal proceeding, "may not obtain [under Fed. R. Crim. P. 6(e)] automatic .. disclosure of grand jury materials for use in a civil suit but instead must seek a . . . court order for access to such materials" based upon a showing of particularized need. The Court expressly reserved "any issue concerning the continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." *Id.* at 431 n.15. This case presents the questions thereby reserved:

1. Whether Rule 6(e) requires a court order for continued access to secret grand jury materials by government attorneys who conducted a grand jury investigation, where the same attorneys thereafter represent the Government in a civil case wherein such materials are relevant and thereby have an opportunity to use such grand jury materials.

2. Whether Rule 6(e) allows grand jury attorneys who later represent the Government in a civil case to have an opportunity, without a court order, to use their retained knowledge of secret grand jury information relevant to such civil case.

RULE 28.1 LIST

For petitioner Nabisco Brands, Inc:

Parent: RJR Nabisco, Inc.

Subsidiaries (other than wholly-owned subsidiaries):
Nabisco Brands, Inc.
All Brand Importers, Inc.
ESPN, Inc.
Nabisco/Cetus Food Biotechnology Research Partnership
Nisco, Inc.
Ohlmeyer Communications Companies
Britannia Industries Ltd. (India)
Ceylon Biscuits Limited (Sri Lanka)
Compania Nacional de Galletas Nabisco La Favorita C.A. (Venezuela)
English Biscuit Manufacturers Limited (Pakistan)
Gelatinas Ecuatorianas S.A. (Ecuador)
Grupo Gamesa S.A. (Mexico)
Industrias Nabisco Cristal, S.A. (Nicaragua)
Kan Biscuits Company Limited (Nigeria)
Mexican Foods Ltd. (New Zealand)
Nabisco Brands Ltd (Canada)
Nabisco Commodities Limited (England)
Patisserie de L'Ile de France, S.A. (France)
Polmak—Gida Endustrisi A.S. (Turkey)
Sociedade Brasileira Beneficiadora de Cha Ltda. (Brazil)
Sodibel Antilles S.A. (France)
Starch Processing Enzyme Co. (Switzerland)
W. & R. Jacob PLC (Ireland)
West Indies Yeast Company Ltd. (Jamaica)
Yamazaki Nabisco Co., Ltd. (Japan)

Yili-Nabisco Biscuit & Food Co. Ltd. (China)

Affiliates:
Combibloc, Inc.
Schupbach AG (Switzerland)
Iricon Agency Ltd.
Calpak Espanola, S.A. (Spain)
Compania Venezolana de Conservas C.A. (Venezuela)
Corrugadora Guatemala, Sociedad Anonima (Guatemala)
Hellenic Food Industries Societe Anonyme (Greece)
Japan Calpak Co., Ltd. (Japan)
Kenya Canners Limited (Kenya)
Fabrica de Cigarrillos El Progreso S.A. (Ecuador)
Litografia A Romero, S.A. (Canary Islands)
R.J. Reynolds (Portugal) Empresa Comercial de Tabacos Ltda. (Portugal)
Supreme Tobacco Company N.V. (Neth. Antilles)
Zigaretten-Umsatz-Verguetungstelle (Z.U.V.) GmbH (West Germany)
Boulevard Distillers and Importers, Inc.
Inbek Co.
Madera Glass Company
Compania Benvori de Produtos Alimenticios (Brazil)
Distribuidora Bega, S.A. de C.V. (Mexico)
Dreher S.A. Vinhos e Champanhas (Brazil)
Embotelladora y Distribuidora, S.A. (Mexico)
Grupo Cuervo, S.A. (Mexico)
Grupo Industrial B.G.S.A. (Panama)
Heublein do Brasil Comercial e Industrial Ltd. (Brazil)
Heublein Industria e Comercio Ltda. (Brazil)
Heublein (Japan) Limited (Japan)
J.M. da Fonseca-Exportador, Lda. (Portugal)

J.M. da Fonseca, Internacional-Vinhos, Limitada (Portugal)
Oso Negro, S.A. (Mexico)
Promocion y Consultoria de Empresas, S.A. de C.V. (Mexico)
Ron Castillo, S.A. (Mexico)
Sangrita de la Vda. de Sanchez, S.A. (Mexico)
Servicios Ejecutivos Corporativos, S.A. de C.V. (Mexico)
Ste. Pierre Smirnoff Fls. (Canada) Ltd. (Canada)
Tequila Cuervo, S.A. (Mexico)
Tequilera de los Altos, S.A. (Mexico)
International Process Foods (Japan)
Kentucky Fried Chicken Espana, S.A. (Spain)
Kentucky Fried Chicken de Venezuela C.A. (Venezuela)
Kentucky Fried Chicken Japan Ltd. (Japan)
Kentucky, S.A. (Spain)
K.F.C. (N.Z.) Ltd. (New Zealand)

For petitioner Archer-Daniels-Midland Company:

Parent: none

Subsidiaries (other than wholly-owned subsidiaries):
ADNAC, Inc.
British Arkady (Holdings) Ltd.
Alfred G. Toepfer International.

Affiliates: none

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 28.1 LIST ii

OPINIONS BELOW 1

JURISDICTION 2

RULE INVOLVED 2

STATEMENT 4

- The Grand Jury Investigation 4
- The Civil Penalty Action 5
- The Civil Litigation Herein 6
- Request of Private Litigants for Grand Jury Material 7
- Justice Department Personnel Involved in Both Actions 7
- Continued Access to Grand Jury Materials .. 8
- The District Court Proceeding 9
- The Proceedings on Appeal 10

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 23

APPENDIX

A. *United States* v. *Archer-Daniels-Midland Company and Nabisco Brands, Inc.*, Slip. Op. (8th Cir. February 24, 1986) 1a

B. Decisions of the District Court 15a

1. *United States* v. *Archer-Daniels-Midland Company and Nabisco Brands, Inc.*, No. 83-51-D (S.D. Iowa March 29, 1984) (ruling on motion to dismiss) 15a

2. *United States* v. *Archer-Daniels-Midland Company and Nabisco Brands, Inc.*, No. 83-51-D (S.D. Iowa Nov. 6, 1984) (ruling denying renewed motion to dismiss or for alternative relief) 20a

3. Excerpts from Transcript of Oral Argument before the District Court on Motion for Clarification of Ruling on Motion to Dismiss, April 20, 1984 ..... 22a

C. *United States of America* v. *Archer-Daniels-Midland Co. and Nabisco Brands, Inc.*, No. 85-1050SI (8th Cir. March 24, 1986) (Judgment) 31a

D. Orders in the Civil Penalty Action 32a

1. *United States of America* v *CPC International Inc.*, No. 80-2139 (N.D. Calif. Aug. 7, 1981) (protective order) 32a

2. *United States of America* v. *CPC International, Inc.*, No. 80-2139 (N.D. Calif. August 26, 1983) (order denying Koerner's motion for disclosure of grand jury material). 35a

E. Comparison of Grand Jury Subpoena and Discovery Requests in this Civil Case 37a

F. Excerpts from Transcript of Oral Argument before the District Court on Motion to Dismiss, March 27, 1984. ..... 52a

G. Excerpts from Deposition of Lawrence J. Aldrich 54a

TABLE OF AUTHORITIES

CASES: Page

Corn Products Refining Co., 47 F.T.C. 587 (1950) 5

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) 22

In re Grand Jury Investigation, 774 F.2d 34 (2d Cir. 1985) ..... 12, *passim*

United States v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) ..... i, *passim*

STATUTES

Sherman Act § 1, 15 U.S.C. § 1 4

Clayton Act, § 7, 15 U.S.C. § 18 4

15 U.S.C. §§ 1-4 21

15 U.S.C. § 15 21

15 U.S.C. § 16 21

15 U.S.C. § 45 (*l*) 5

15 U.S.C. § 77k 21

15 U.S.C. § 771 21

15 U.S.C. § 77x 21

15 U.S.C. § 78i 21

15 U.S.C. § 78r 21

15 U.S.C. § 78u(c) 21

15 U.S.C. § 78dd-2(6) 21

15 U.S.C. § 2615 21

26 U.S.C. §§ 6651-59 21

26 U.S.C. §§ 7201-04 21

28 U.S.C. § 1254(1) 2

RULES

Fed. R. Crim. P. 6(e) ..... i, *passim*

Table of Authorities Continued

Page

LEGISLATIVE HISTORY

H.R. Rep. No. 95-195, 95th Cong., 1st Sess. (1977) 18, 21

S. Rep. No. 95-354, 95th Cong., 1st Sess. (1977) 18

Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess. (1977) 18

123 Cong. Rec. 11108-12 (1977) 18

MISCELLANEOUS

U.S. Dept. of Justice, Merger Guidelines of Department of Justice—1984, 49 Fed. Reg. 26824 (1984); 2 Trade Reg. Rep. (CCH) ¶ 4503.303 (June 14, 1984) 6

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ARCHER-DANIELS-MIDLAND COMPANY
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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Archer-Daniels-Midland Company and Nabisco Brands, Inc., hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reported at 785 F.2d 206, is reproduced as Appendix A to this petition (pp. 1a-14a, *infra*). Relevant written orders of the district court, which are unreported, are reproduced as Appendix B (pp. 15a-30a, *infra*), together with pertinent excerpts, including oral rulings, from the transcript of oral argument in the district court.

JURISDICTION

The judgment of the court of appeals (App. C, p. 31a, *infra*) was entered on February 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

(e) **Recording and Disclosure of Proceedings.**

* * * * * * * * * *

(2) **General Rule of Secrecy.** A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) **Exceptions.**

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel . . . as are deemed necessary by an attorney for the govern-

ment to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

* * * * * * * *

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT

On December 14, 1982, the Antitrust Division of the Justice Department filed a civil complaint alleging that an agreement whereby petitioner Archer-Daniels-Midland Company ("ADM") leased two corn wet milling plants from petitioner Nabisco Brands, Inc. ("Nabisco"), constituted an acquisition or merger in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 7 of the Clayton Act, 15 U.S.C. § 18. Previously, there was a criminal antitrust grand jury investigation of alleged price collusion in the entire corn wet milling industry, and in the course of that investigation the grand jury gathered from petitioners and others both documents and testimony of witnesses pursuant to subpoena. After the grand jury investigation had ended, several attorneys and other Justice Department personnel who had participated in the grand jury investigation were assigned to the civil case. Some of them continued to have access to grand jury documents in their offices or files. All of them have their memory-retained knowledge of secret grand jury information relevant to the civil antitrust litigation. The Government has never sought a court order pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) (herein "(C)(i) order") to allow these Justice Department personnel to participate in the civil case or to authorize their continued access to grand jury materials.

The Grand Jury Investigation

In 1979, a federal grand jury was impaneled in the Northern District of California to investigate alleged collusive pricing by companies engaged in corn wet

milling. In the course of its broad-ranging investigation into all aspects of the corn wet milling industry, the grand jury questioned many witnesses and collected over 700,000 documents relating to activities in the industry from 1973 to 1980. ADM and Nabisco produced some of those documents. These, along with all others produced to the grand jury, were placed in the custody and control of the Department of Justice in Washington, D.C., subject to an impounding order of the court dated March 7, 1980. This order is not in the record herein because the Government regards it as part of the secret grand jury material. The grand jury investigation was terminated in November 1980 without the return of any indictments.

The Civil Penalty Action

On May 30, 1980, while the grand jury investigation was still in progress in the Northern District of California, the Government filed in the same court a civil penalty action under Section 5(*l*) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(*l*), naming as defendants several members of the corn wet milling industry, including petitioner Nabisco's predecessor in interest (Standard Brands, Inc.). The complaint alleged that the defendants had violated an FTC cease and desist order prohibiting collusive pricing and other practices. *Corn Products Refining Co.*, 47 F.T.C. 587, 659-63 (1950). On August 7, 1981, the district court in California entered an order authorizing "disclosure of such grand jury material to personnel employed by the Department of Justice and the Federal Trade Commission as may be necessary for such persons to assist in the conduct, prosecution or settlement of this [civil penalty] suit" but directing

"that any such person shall not make any disclosure to anyone else." (App. D, p. 33a, *infra.*) The court's order then explicitly directed: "Plaintiff [federal government] shall make no other disclosure except upon court order." (*Id.*) The civil penalty action was terminated on June 7, 1982, by consent of the parties without the imposition of any civil penalties.

The Civil Litigation Herein

In July 1982, one month after termination of the civil penalty action, the Antitrust Division began a civil investigation of the agreement whereby ADM, on June 12, 1982, leased two wet corn milling plants from Nabisco. Then, on December 14, 1982, the Government filed the complaint in this civil action alleging that the lease constituted an impermissible merger or acquisition under the Sherman and Clayton Acts.

The civil lawsuit encompassed the subject matter of the prior grand jury investigation. A critical issue in the civil proceeding is whether the challenged acquisition will facilitate collusive pricing, and it is therefore important to develop evidence concerning whether firms in the industry have previously been found to have engaged in collusive pricing and whether the market characteristics have changed since "the most recent finding."[1] Thus, the Government's pre- and post-complaint discovery requests in this civil case have probed many of the same subjects as were involved in the grand jury's subpoenas of documents

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[1]U.S. Dept. of Justice, Merger Guidelines of Department of Justice—1984, 49 Fed. Reg. 26824 (1984); 2 Trade Reg. Rep. (CCH) ¶ 4503.303 (June 14, 1984). The grand jury proceeding, which was terminated without indictment, is the most recent finding relating to alleged price collusion in the industry.

and information concerning pricing and other issues relating to competition. The discovery requests seek information about the same parties, products, industry and market structure during the period 1970 to 1982.[2]

Request of Private Litigants For Grand Jury Material

Some members of the corn wet milling industry were named as defendants in a civil antitrust suit brought by private parties as plaintiffs seeking treble damages. One such plaintiff, John E. Koerner & Co., moved in the Northern District of California for access to certain grand jury material under Fed. R. Crim. P. 6(e). The motion was denied on August 26, 1983, which was approximately eight months after the Government had filed its complaint in this civil action, because "Movant has failed to demonstrate particularized need for these materials [and] . . . the need for [grand jury] secrecy continues and outweighs any demonstrated need by the Movant." (App. D, pp. 35a-36a, *infra.*)

Justice Department Personnel Involved in Both Actions

Five attorneys (including the Government's lead attorney in the grand jury proceeding), an economist and a paralegal have worked or are currently working on this civil litigation after having participated in the grand jury investigation. The five attorneys had access to all grand jury materials during the criminal

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[2] A comparative analysis showing the extensive overlap among the subjects investigated by the grand jury and the subjects of discovery in the civil suit was presented to the court below and is reproduced as Appendix E, pp. 37a-51a, *infra.*

investigation; several questioned witnesses and reviewed documents during the course of the grand jury proceeding; all have participated in the civil litigation.

Continued Access to Grand Jury Materials

During oral argument before the district court on petitioners' initial motion, the Government's chief trial attorney assured the court that the grand jury materials were securely stored "in the basement" and then went on to represent: "We're not using them. We don't have access to them, and there's no disclosure of them."(App. F, p. 53a, *infra.*) Subsequent discovery, which the Government tried to prevent, showed this assurance to be incorrect. Depositions of government personnel disclosed that some grand jury documents were at relevant times (and may still be) located in the offices or files of various attorneys and an economist working on the civil litigation. One of the government attorneys had directed a paralegal to assemble a group of grand jury documents from the basement and bring them to his office for review.[3] As to certain documents in the files of the economist, he could not tell whether they came from the grand jury or other sources, and the documents were not finally identified as grand jury documents until a government attorney reviewed them at his deposition.

The district court acknowledged that "grand jury materials keep cropping up in the offices of government lawyers handling this case." (App. B, p. 25a, *infra*). The court of appeals also found a "continued

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[3] This attorney, who later left government service, testified that he did not review the documents, although he was "not absolutely certain." (App. G, p. 56a, *infra.*)

possession of some documents" by government attorneys (App. A, p. 13a, *infra*).

The District Court Proceeding

Petitioners moved in December 1983 to have the civil complaint dismissed without prejudice on the ground that the Government had violated Rule 6(e)(2) by proceeding, without first obtaining a court order allowing access, to assign to the civil case several lawyers who had extensive knowledge of relevant grand jury secrets. The district court denied the motion, ruling that no "prohibited disclosure . . . occurs when a lawyer who attended the grand jury later conducts civil litigation in which he might make use of his knowledge of matters that occurred before the grand jury." (App. B, p. 17a, *infra*.) In making this ruling that Rule 6(e) does not apply to this case, the district court nonetheless acknowledged that there is some overlapping of issues, and that "defendants' concerns that the government has used or will use, in some manner, information it gained in the grand jury investigation are well founded." (*Id.* at p. 19a, n.2, *infra*.)

Petitioners moved for clarification of the district court's ruling and requested a preliminary injunction barring further disclosure of grand jury secrets and prohibiting further participation in the case by the government personnel who were already familiar with or had continued access to the grand jury materials. The district court denied the motion for clarification and refused to enjoin participation of any government personnel then assigned to the civil case. Apart from allowing limited discovery related to the continued access of government personnel to grand jury ma-

terial, the only relief the court granted was to prohibit additional disclosure to or use by government personnel who had not *already* had access to grand jury materials. (*Id.* at p. 29a, *infra.*)

Discovery depositions developed evidence of extensive access to grand jury material, which formed the basis of petitioners' renewed request for relief. The district court again denied relief. It ruled this time that, because the civil proceeding was "unrelated" to the grand jury proceeding, it was not a violation of Rule 6(e) as interpreted in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), for the grand jury lawyers to participate in the civil case. (*Id.* at pp. 20a-21a, *infra.*) The district court dismissed the presence of grand jury documents in the offices and files of government personnel as involving only "questionable 'storage' practices." (*Id.* at p. 21a, *infra.*)

The Proceedings On Appeal

On appeal, the Eighth Circuit formulated the "threshold question" as "whether the assignment to a civil case of the same attorneys who participated in a prior grand jury investigation even constitutes disclosure of matters that occurred before the grand jury." (App. A, p. 11a, *infra.*) The court held that

> "[f]or there to be a disclosure, grand jury materials must be disclosed to *someone.* We do not believe that an attorney's recollection of facts learned from his prior grand jury participation can be considered disclosure so as to invoke the prohibition of Rule 6(e)." (*Id.* (emphasis in original).)

It therefore concluded that the attorneys who had participated in the grand jury proceeding could be assigned to the civil case without violating Rule 6(e). The court of appeals stated that its decision was "strengthened" by the fact that the cause of action in the civil suit is a "distinct and separate action" from the grand jury investigation (*id.* at p. 12a, *infra.*)

The Eighth Circuit also held that government counsel's continued access to grand jury materials in their offices did not violate Rule 6(e) because "[t]here has been no showing that these materials have been disclosed . . . or that Government attorneys are making continued use of them in this civil case." (*Id.* at p. 13a, *infra.*) The court of appeals did not provide any explanation or reconciliation of this assertion of no "continued use" and the district court's conclusion "that defendants' concerns that the government has used or will use, in some manner, information it gained in the grand jury investigation are well founded." (*See supra,* p. 9.)

REASONS FOR GRANTING THE WRIT

The practical reality of the Eighth Circuit's decision is that government lawyers participating in a grand jury investigation will have unfettered freedom to use their retained knowledge of grand jury material in preparing and litigating a civil lawsuit in which such material is relevant, and will be entitled to have continued access to grand jury documents in their files long after the grand jury investigation is terminated without an indictment. The case thus presents either the same question decided by the Second Circuit and presented by the Government for review in *United States* v. *John Doe I, Inc.*, No. 85-1613, or a near

variant. In either event, the question falls within the issues that the Court expressly left open in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 431 n.15 (1983): those "concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." The questions—divided by petitioners between the question of continued access to grand jury materials and the question of the opportunity to use unrefreshed recollections of such materials—are squarely posed and should now be decided by this Court.

1. The Government's petition in No. 85-1613 seeks review of the Second Circuit's decision that Antitrust Division attorneys who participated in a grand jury proceeding may not have access to grand jury materials for use in subsequent civil litigation without obtaining a court order pursuant to Rule 6(e). *In Re Grand Jury Investigation*, 774 F.2d 34 (2d Cir. 1985). The Government says in its petition that there is no conflict among the circuits on the question it presents (Pet., No. 85-1613, p. 15), but it quotes the contrary reasoning of the Eighth Circuit in this case to attack the soundness of the Second Circuit decision (*id.* at 18, 19). In truth, the view of the Eighth Circuit that, "for there to be a disclosure, grand jury materials must be disclosed to *someone*"[4] cannot be reconciled with the Second Circuit's position that a (C)(i) disclosure order is required to allow government lawyers pursuing a civil matter to refresh their recollections derived from prior participation in the grand jury proceeding. 774 F.2d at 40. As the Government says

[4] App. A, p. 11a, *infra*; (emphasis in original) quoted by the Government at p. 18 of its petition in No. 85-1613.

in its petition, once any court allows a government lawyer to use his memory of grand jury testimony or documents in a civil case, it is hard rationally to withhold the use of documentary memory refreshers: "there is no virtue in requiring an attorney to rely on his possibly inaccurate memory when documents are available." (Pet., No. 85-1613, p. 19.)

Certainly in terms of the long-standing policy of grand jury secrecy incorporated in Rule 6(e), there is no distinction between use in a civil case of retained knowledge of grand jury material and use of refreshed knowledge of the material. If an opportunity to use such refreshed knowledge amounts to disclosure, as the Second Circuit has correctly held based on this Court's analysis in *United States* v. *Sells Engineering, Inc., supra,* then the opportunity to use unrefreshed knowledge of what was laid before a grand jury is equally a disclosure permissible only pursuant to an order specifically allowing disclosure based on the criteria Rule 6(e) establishes.

2. The Second Circuit correctly determined that the Court's decision in *Sells* equates Rule 6(e) "disclosure" with access creating an opportunity for use in a subsequent civil case. The Rule therefore forbids such access to grand jury materials in a subsequent civil case unless authorized by a (C)(i) "disclosure" order.

In *Sells* the Court held that government lawyers who took no part in a grand jury investigation may not have access to grand jury materials for potential use in a civil suit except as may be allowed in a (C)(i) order based on a showing of particularized need. 463 U.S. at 420. In reaching this decision, the Court first established the premise that subsection (A)(i) of Rule

6(e)(3) accords government attorneys automatic access to grand jury materials only for use in prosecuting the criminal action. 463 U.S. at 428-31. Such access is permitted "not for the general and multifarious purposes of the Department of Justice, but because both the grand jury's functions and their own *prosecutorial* duties require it." *Id.* at 429 (emphasis in original). The Court then found that both the policy of grand jury secrecy underlying Rule 6(e) and its legislative history militated against automatic access for use in a civil proceeding. The Court's reasoning applies with the same force to retained knowledge or refreshed knowledge as it does to newly gained knowledge of grand jury information.

a. The Court held in *Sells* that allowing access to grand jury secrets for potential use in civil litigation without a disclosure order threatened to undermine the purposes of grand jury secrecy. The Court reasoned that the physical transfer of grand jury documents to attorneys in a civil case who took no part in the grand jury proceeding "increase[s] the number of persons to whom the information is available (thereby increasing the risk of inadvertent or illegal release to others)" and "renders considerably more concrete the threat to the willingness of [grand jury] witnesses to come forward and to testify fully and candidly." *Id.* at 432.

The Eighth Circuit's decision, permitting grand jury attorneys now in the civil case to have access to grand jury documents in their offices and to have an unfettered opportunity to use in the civil case their retained knowledge of grand jury secrets, is blind to these concerns. Under the Eighth Circuit's ruling, a grand jury attorney is free to draw on his knowledge

of what transpired before the grand jury to investigate alleged civil offenses, to prepare a civil complaint, to frame discovery requests and to identify, interview and depose witnesses in the civil action. A government attorney in that position must be presumed to use the retained knowledge of grand jury information since, as the Second Circuit said in the case that the Government wants reviewed, "it would be almost impossible for any attorney in such a position to compartmentalize his thoughts and litigate a civil case without in some way using his recollection of facts gleaned during the investigation." *In re Grand Jury Investigation*, *supra*, 774 F.2d at 43. Further, as in this case, a grand jury lawyer may work side-by-side with other lawyers who did not participate in the grand jury proceeding, thus sharing while developing and litigating the civil case the grand jury lawyer's unique knowledge, based on grand jury secrets, of the issues in the civil case.

All of this creates the opportunity for use of grand jury materials in civil litigation just as surely as the review of grand jury documents for the first time by another attorney. How then is the risk of release to others to be minimized, and how are grand jury witnesses to be assured that their testimony is protected from use in civil litigation? The Eighth Circuit's tautology is not an answer: "[f]or there to be a disclosure, grand jury matters must be disclosed to *someone*" (App. A, p. 11a, *infra* (emphasis in original)), and "[i]n the *Sells* case there were two sets of attorneys, and a disclosure occurred, whereas in the present case there is only one set of attorneys, and no disclosure" (*id.* at 12a). The concerns articulated by the Court in *Sells* are not laid to rest because

attorneys in the grand jury proceeding do not hand over grand jury documents to a second set of attorneys but rather work on the civil case themselves, armed with their retained knowledge of grand jury secrets and with access to grand jury documents in their offices.

The Second Circuit's decision is more alert to these concerns than is the decision below. Rather than improperly focusing on whether there is "one set" or "two sets" of lawyers, the Second Circuit reasoned that continued access creating an opportunity for use of grand jury materials by the same lawyers was "tantamount to" disclosure within the meaning of Rule 6(e) because of the temptation for the lawyers to use such materials in the civil action. 774 F.2d at 40. The court concluded that access allowing such an opportunity for use posed a "significant" risk of inadvertent or illegal disclosure to others and would have a chilling effect on grand jury witnesses. *Id.* at 42. The reasoning applies with equal force to the assignment of grand jury attorneys to subsequent civil litigation and their continued access to grand jury documents in their offices.

Another concern articulated by the Court in *Sells* is the integrity of the grand jury system. 463 U.S. at 432. The Court expressed concern that, if grand jury prosecutors knew their colleagues could make use of grand jury materials in a civil case, "they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely." 463 U.S. at 432. *A fortiori,* the same temptation would exist under the Eighth Circuit's de-

cision, which gives grand jury attorneys later assigned to a civil case the unfettered right to call upon all of their retained knowledge of secret grand jury information for use in the civil suit, as well as the right to have in their offices grand jury documents relevant to the civil suit but no longer pertinent to any criminal purpose.

Again the Eighth Circuit's simplistic view—"an attorney cannot disclose to himself"—ignores this concern of the Court in *Sells*. It does so in spite of a record disclosing that the grand jury investigation generated a storehouse of information related to all aspects of the corn wet milling industry, including pricing and market information critical to the civil litigation. (*See* pp. 6-7, *supra.*)

b. As the Court recognized in *Sells*, the legislative history of the 1977 amendment to Rule 6(e) indicates that *no* opportunity for use of grand jury materials in a civil suit should be permitted without a court order under subsection (C)(i) of Rule 6(e)(3). 463 U.S. at 440. This history fully supports a ruling that would allow the assignment of a grand jury lawyer to a subsequent civil case or the grand jury lawyer's continued access to grand jury documents only pursuant to an order obtained upon a showing of particularized need.

The 1977 amendment to Rule 6(e) added the provision in Rule 6(e)(3)(A)(ii) allowing disclosure to nonlawyers consisting of "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." The limitation to "criminal law" was not in the amendment to the rule as originally

proposed; thus the House of Representatives, after hearings on the proposal, voted to disapprove it. 123 Cong. Rec. 11108-12 (1977). The House committee's report recommended disapproval specifically because

> "[i]t was feared that the proposed change would allow Government agency personnel to obtain grand jury information which they could later use in connection with an unrelated civil or criminal case. This would enable those agencies to circumvent statutes that specifically circumscribe the investigative procedure otherwise available to them." H.R. Rep. No. 95-195, 95th Cong., 1st Sess. 4 (1977) (footnote omitted).

The Senate Judiciary Committee altered the proposal by inserting the criminal-law use limitation, in order to "allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws . . ." S. Rep. No. 95-354, 95th Cong., 1st Sess. 1-2, 5-8 (1977).

The clear concern of Congress was the risk of use of grand jury materials in civil litigation without the protections afforded by the requirement of obtaining court authorization. As this Court recognized in *Sells*, this concern of Congress applies to the risk of such use by the Justice Department as well as by others. 463 U.S. at 438-40; see *Hearings on Proposed Amendments to the Federal Rules of Criminal Procedure before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 67 (1977) (statement of Acting Deputy Attorney General Richard Thornburgh). Moreover, no distinction was drawn in the legislative history between risk

of use by attorneys who participated in the grand jury proceedings and risk of use by attorneys who had not. Rather, as this Court noted in *Sells*, "the key distinction was between disclosure for criminal use, as to which access should be automatic, and for civil use, as to which a court order should be required." 463 U.S. at 440. Thus, nothing in the purposes of the Rule, its legislative history, or logic supports the one set of attorneys/two sets of attorneys distinction drawn by the Eighth Circuit.

3. If the issue in this case differs at all from the issue in the Second Circuit's decision in *In re Grand Jury Investigation*, which is the subject of the Government's pending certiorari petition, it is because the Eighth Circuit was willing to rely on the blanket assurance that government lawyers with retained knowledge of grand jury secrets "will not use grand jury materials in this [civil] case . . . ." (App. A, p. 13a, n.13, *infra.*) The court refused to acknowledge the potential for misuse inherent in the attorneys' retained knowledge of grand jury information and inherent in the presence of grand jury documents in their offices or files rather than securely stored "in the basement" as initially represented.

The Eighth Circuit characterized this as "questionable storage practices," amounting to nothing more than "continued possession of some documents that the Government attorneys have a right to possess." (*Id.* at p. 13a) The court simply ignored the fact that the "automatic" right of government lawyers to grand jury information is strictly limited under subsection (A)(i) of Rule 6(e)(3) to performance of their prosecutorial duties in a criminal proceeding.

The Eighth Circuit, in an attempt to distinguish the Second Circuit's decision prohibiting such continued access by grand jury lawyers, asserted that the present case "does not contain a clear showing of continued use of grand jury materials" by the attorneys conducting the civil litigation. (*Id.* at n.12.) This asserted distinction is not pertinent because the Second Circuit did not base its decision on a showing of continued use. Rather, its decision was based only on access to grand jury materials creating an opportunity for use in the civil case. Indeed, the Second Circuit expressly noted that the civil complaint filed by the Government in that case does not "quote from or refer to any grand jury transcripts or documents subpoenaed by the grand jury, and does not mention any witnesses before the grand jury or even refer to the existence of a grand jury." 774 F.2d at 37. The court nevertheless enjoined the grand jury attorneys from any "further access to or use of the grand jury materials in the civil action," *id.* at 43, because continued access "would invite" use, *id.* at 40.

The Second Circuit's reasoning again is responsive to the concerns expressed by the Court in *Sells,* whereas the reasoning of the Eighth Circuit is not. In *Sells,* this Court disavowed a rule requiring evidence of actual misuse by government attorneys and instead premised its holding on the fear that, "if and when [grand jury misuse] does occur, it would often be very difficult to detect and prove." 463 U.S. at 432. The facts in this case confirm the wisdom of the Court's approach.

4. The court below said that its decision was "strengthened by the fact" that the cause of action in this "civil antitrust suit brought by the Government

against ADM and Nabisco alleging an unlawful acquisition or merger is a distinct and separate action from the prior grand jury investigation for price-fixing." (App. A, p. 12a, *infra*.) Of course, any civil action is always "separate and distinct" from a grand jury proceeding. Moreover, many federal statutes apply criminal and civil sanctions to conduct that may overlap in whole, or only in part.[5] This is far from being a factor favoring continued access, as the House committee was expressly concerned in 1977 about use of grand jury materials "in an *unrelated* civil or criminal case." H. R. Rep. No. 95-195, *supra*, at 4 (emphasis supplied).

What matters is not whether the criminal and civil cases involve the same cause of action; rather, it is whether the subject matter of secret grand jury material is relevant to the subsequent civil action. It is such relevancy that creates the opportunity for improper use and disclosure. Here, the evidence developed before the grand jury relating to alleged collusive pricing in the corn wet milling industry is, as we have shown, closely related to allegations in the civil case challenging the legality of the lease of two corn wet milling plants. Given this overlap, there can be no question that the grand jury evidence on alleged col-

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[5] *See, e.g.* 15 U.S.C. §§ 1-4 (criminal sanctions for Sherman Act violations); 15 U.S.C. §§ 15, 16 (civil remedies for Clayton and Sherman Act violations); 26 U.S.C. §§ 7201-04 (criminal sanctions for violations of income tax laws); 26 U.S.C. §§ 6651-59 (civil penalties for violations of income tax laws); 15 U.S.C. §§ 77x, 78u(c), 78dd-2(6) (criminal penalties for securities laws violations); 15 U.S.C. §§ 77k, 771, 78i, 78r (civil penalties for securities laws violations); 15 U.S.C. § 2615 (criminal and civil penalties for violations of Toxic Substances Control Act).

lusive pricing is relevant to issues in the civil case and can readily be put to use therein. Indeed, in the district court, the Government's trial attorney acknowledged: "Yes, Your Honor, I don't dispute that . . . ." (App. B, p. 27a, *infra*.) This opportunity for use in the civil case applies both to the grand jury information that the Government's lawyers in the civil action carry in their heads and the grand jury documents that are accessible in their offices or files.

5. The court below did not consider the question whether the government could have obtained a (C)(i) order in this case if it had sought such an order. Thus, the opinion of the Eighth Circuit makes no reference to the Court's observation in *Sells* that the substantive standard governing issuance of a (C)(i) order "is a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others." 463 U.S. at 445. Although the standard for issuance of a (C)(i) order, as established by the Court in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 222-23 (1979), applies to both government attorneys and private parties, the Court in *Sells* observed that "[n]othing in *Douglas Oil* . . . requires a district court to pretend that there are no differences between governmental bodies and private parties." 463 U.S. at 445. If the government attorneys herein are able to satisfy the "highly flexible" standard for issuance of a (C)(i) order, they should have obtained such an order; if they are not able to meet the standard, then they should not be allowed an opportunity to use their grand jury information in this civil case.

CONCLUSION

As the Court recognized in *Sells*, the issues decided in that case go to the heart of the policy underlying Rule 6(e): preservation of grand jury secrecy and protection of the integrity of the grand jury system. 463 U.S. at 432. In *Sells*, however, the Court addressed only a portion of the issues presented by Rule 6(e) and expressly reserved for another case all issues "concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." *Id.* at 431, n.15.

The reserved issues are no less important to the administration and enforcement of numerous federal laws, and especially the antitrust laws, than the issues resolved in *Sells* and, indeed, may be even more important. The Government obviously needs to know what Rule 6(e) considerations affect its assignment to civil cases of lawyers who have previously conducted grand jury investigations. Similarly, private parties in such civil cases also need to know the ground rules. The uncertainties on both sides are demonstrated by both the Eighth Circuit's decision in this case and the Second Circuit's decision that the Government has asked the Court to review. This case, either alone or in combination with the Second Circuit case, raises the reserved issues of *Sells*, which are of vital importance to federal law enforcement. The Court should decide them now.

This petition for a writ of certiorari should therefore be granted. The case should be heard together with No. 85-1613 if certiorari is granted in that case.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

85-1050

UNITED STATES OF AMERICA,

Appellee,

v.

ARCHER-DANIELS-MIDLAND COMPANY and NABISCO BRANDS, INC.,

Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: May 17, 1985

Filed: February 24, 1986

Before BRIGHT, Senior Circuit Judge, ROSS and JOHN R. GIBSON, Circuit Judges.

BRIGHT, Senior Circuit Judge.

This appeal arises from a civil antitrust suit brought by the Government against the Archer-Daniels-Midland Company (ADM) and Nabisco Brands, Inc. (Nabisco). ADM and Nabisco moved for dismissal, or for alternative relief, on the ground that the Government violated Fed. R. Crim.

P. 6(e), the rule protecting the secrecy of grand jury proceedings. The district court[1] denied their motion and this appeal followed. ADM and Nabisco contend that the Government violated Fed. R. Crim. P. 6(e) by assigning attorneys who participated in a prior grand jury investigation to this subsequent civil litigation without first obtaining a court order. In addition, ADM and Nabisco argue that Fed. R. Crim. P. 6(e) has been violated because the attorneys working on this case have continuously possessed grand jury documents in their personal files. The Government submits that the district court order is a nonappealable interlocutory order. We hold that the district court order is appealable pursuant to the collateral order doctrine, that the assignment of attorneys in this case does not constitute, by itself, a violation of Fed. R. Crim. P. 6(e), and that there has been no showing that grand jury documents have been used in violation of Fed. R. Crim. P. 6(e). Accordingly, we affirm the district court's ruling.

I. BACKGROUND.

In 1979, a federal grand jury was impaneled in the Northern District of California to investigate possible price-fixing by companies engaged in corn wet milling. The grand jury questioned many witnesses and collected approximately 700,000 documents, covering a time period from 1973 to 1980. Both ADM and Nabisco produced documents under subpoena. These documents, and all others produced by the grand jury, came under protection and control of the Department of Justice in Washington, D.C., as custodian.[2] The grand jury concluded its investigation in late 1980 without issuing any indictments.

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[1] The Honorable Harold D. Vietor, Chief Judge, United States District Court for the Southern District of Iowa.

[2] An Impounding Order, still under seal, was entered by Chief Judge Roger F. Peckham of the United States District Court for the Northern District of California on March 7, 1980.

On June 12, 1982, Nabisco leased its corn wet milling facilities to ADM. As a result, ADM became the nation's largest manufacturer of high fructose corn syrup. In July of 1982, the Antitrust Division of the Justice Department began a civil investigation to determine whether the lease agreement amounted to an acquisition or merger in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and section 7 of the Clayton Act, 15 U.S.C. § 18. Some of the attorneys assigned to the investigation had previously worked on the grand jury price-fixing investigation. On December 14, 1982, the Government filed a civil antitrust complaint against ADM and Nabisco.

In December 1983, ADM and Nabisco moved to dismiss the complaint without prejudice on the ground that the Government violated Fed. R. Crim. P. 6(e)(2), by assigning attorneys who participated in the prior grand jury investigation to this subsequent civil litigation without first obtaining a court order.[3] On March 29, 1984, the district court denied the motion, concluding that no evidence before the court established that any improper disclosure had occurred. On April 11, 1984, ADM and Nabisco moved for a clarification of the district court order and also for a preliminary injunction barring any disclosure of grand jury materials by or to Government counsel (or their assistants) except pursuant to a Rule 6(e)(3)(C) order, and barring any further participation in this case by Government counsel and legal staff who at the time had access to such materials. On April 20, 1984, the district court denied the motion for clarification of its prior order, yet did enter limited injunctive relief. The court said:

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[3] ADM and Nabisco and the Government also filed cross-motions for summary judgment. These motions raised the issue of whether the lease agreement constituted an acquisition within the meaning of section 7 of the Clayton Act. The district court ruled that it did. *United States v. Archer-Daniels-Midland Co.*, 184 F. Supp. 1134, 1140 (S.D. Iowa 1984), *appeal dismissed*, Misc. No. 84-8065 (8th Cir. May 29, 1984).

> [T]he plaintiff and each attorney or assistant to such attorney representing the plaintiff in this case and to whom no grand jury material has previously been disclosed or made accessible are hereby enjoined and restrained from requesting, receiving, reviewing, reading, or otherwise obtaining any grand jury material except as expressly permitted by a Court under Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure, and each government attorney, including any assistant to such attorney, who represents plaintiff in this case and to whom any grand jury material has previously been disclosed, or made accessible, whether authorized by law or not, is hereby enjoined and restrained from disclosing or making accessible any grand jury material to any government attorney or assistant who is prohibited from receiving such grand jury material under the provisions of the proceeding portion of this preliminary injunctive order.

In September 1984, after deposing five present and former Government attorneys and staff members, ADM and Nabisco filed a "renewed" motion in which they requested dismissal of the Government's complaint, or various forms of alternative relief, again on the ground that the Government violated Fed. R. Crim. P. 6(e).[4] On November 6,

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[4] ADM's and Nabisco's "renewed" motion read as follows:

> For reasons more fully set forth in their respective Memoranda filed herewith, defendants Archer-Daniels-Midland Company and Nabisco Brands, Inc. hereby move for an order granting, in the alternative, the following relief:
>
> I. Dismissing the complaint without prejudice; or
>
> II. Conditioning the continuance of the action upon plaintiff's obtaining, within a prescribed period, an order pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) permitting all parties access to all grand jury ma-

1984, the district court denied this motion.[5]

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terial previously disclosed to any member of plaintiff's staff; or

III. Prescribing the following mandatory and prohibitory injunctive relief against plaintiff:

(A) disqualifying economist John R. Sawyer from any further involvement in this case;

(B) disqualifying from any further involvment in this case all members of the legal staff who have worked or who are currently working on this case;

(C) ordering removal from the files of this case of all internal work product prepared by all members of the legal staff who have worked or are currently working on this case;

(D) barring from use in this case all depositions taken by the plaintiff;

(E) ordering a thorough search of the files of all personnel ever involved in this case by Mr. Douse, an attorney able to identify grand jury documents, in order to segregate and impound all corn products grand jury materials found therein; and

(F) precluding any staff member thus disqualified from engaging in any communication, directly or indirectly, with any member of the replacement staff with respect to this proceeding.

The requested relief is warranted because plaintiff has engaged in unlawful disclosure of secrets obtained from the corn products grand jury in violation of Fed. R. Crim. P. 6(e) and the doctrine established by the Supreme Court in *United States v. Sells Engineering, Inc.*, 463 U.S. ____, 103 S.Ct. 3133 (1983). This relief is required both to cure the problems created by the plaintiff's conduct and to deter future abuses of the grand jury process.

[5] The November 6, 1984 district court order read as follows:

Defendants' renewed motion to dismiss complaint without prejudice, or for alternative relief, pursuant to *United States v. Sells Engineering*, 103 S.Ct. 3133 (1983), is before the court for ruling.

A review of the briefs and the discovery material leads the court to conclude that the injunctive relief granted on April 20, 1984, remains adequate, and that neither dismissal nor any of the alternative relief sought by defendants is appropriate.

It is not a violation of Fed. R. Crim. P. 6(e)(2), as interpreted in

Thereafter, on January 7, 1985, ADM and Nabisco appealed. These appellants contend that the Government violated Fed. R. Crim. P. 6(e) by assigning attorneys who participated in the prior grand jury investigation to this subsequent civil litigation without first obtaining a court order. Furthermore, they charge violations of Fed. R. Crim. P. 6(e) because the attorneys working on this case have continuously possessed grand jury documents in their personal files. ADM and Nabisco base their argument on the Supreme Court's interpretation of Fed. R. Crim. P. 6(e) in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983). The Government argues that the November 6, 1984 district court order amounts to a nonappealable interlocutory order. The Government further argues that if this court should reach the merits, then it should conclude that Fed. R. Crim. P. 6(e) and the *Sells* decision do not prohibit the assignment to this case of attorneys who previously conducted the grand jury investigation, and that there has been no showing that grand jury documents have been used in violation of Fed. R. Crim. P. 6(e).

II. DISCUSSION.

A. Appealability.

We first address the Government's contention that this interlocutory appeal should be dismissed for lack of appellate jurisdiction. ADM and Nabisco argue, to the contrary, that the November 6, 1984 district court order may be appealed under the collateral order doctrine. *See Cohen*

United States v. Sells, supra, for an attorney who attended the grand jury to participate in this case, which is unrelated to the grand jury investigation.

The record discloses questionable "storage" practices by the Justice Department in respect to grand jury materials, but does not disclose any violation of Rule 6(e)(2) that is material to this lawsuit.

Defendants' motion to dismiss or for alternative relief is denied in its entirety.

v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47 (1949). We agree.[6]

The collateral order doctrine represents a "narrow exception to the requirement that all appeals under § 1291 await final judgment on the merits." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). Its "reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell, Inc. v. Koller*, 105 S.Ct. 2757, 2761 (1985) (citations omitted). To fall within this exception, a district court order must at a minimum "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). We believe that the district court order in issue meets this test.

The order conclusively determined that the assignment of attorneys who participated in previous grand jury proceedings to this civil case did not constitute a violation of Fed. R. Crim. P. 6(e)(2). It thereby resolved an important issue completely separate from the merits of the action. Furthermore, because the district court order concerns the secrecy of grand jury proceedings, it is effectively unreviewable on appeal from a final judgment. Any harm to ADM's and Nabisco's interests which are sought to be protected by keeping grand jury proceedings secret cannot be undone by a later reversal of the district court order.

The Supreme Court recently held that an order denying a motion to disqualify the opposing party's counsel in a civil case may not be appealed under the collateral order

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[6] Because we conclude that the district court order is appealable under the collateral order doctrine, we need not address ADM's and Nabisco's contention that we also have jurisdiction based on 28 U.S.C. § 1292(a)(1) or that we should review this case by issuing a writ of mandamus.

doctrine because such an order can be effectively reviewed on appeal from a final judgment. *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. at 377. We believe, however, that the present case is qualitatively different from *Firestone.* As discussed above, the district court in this case did more than simply deny a motion to disqualify counsel. The district court order concerns the secrecy of grand jury proceedings. Therefore, without immediate review, ADM and Nabisco face the possibility of losing "the legal and practical value" of the rights they have asserted. In *Firestone,* the Supreme Court indicated that in such situations an appeal may be allowed under the collateral order doctrine. 449 U.S. at 377. *See also Mitchell v. Forsyth,* 105 S.Ct. 2806 (1985) (district court's denial of a claim of qualified immunity is immediately appealable because otherwise the defendant's right to be immune from suit would be effectively lost); *Evans v. Dillahunty,* 711 F.2d 828 (8th Cir. 1983). Accordingly, we conclude that we have jurisdiction over this appeal.[7]

B. Alleged Fed. R. Crim. P. 6(e) Violations.

ADM and Nabisco first contend that Fed. R. Crim. P. 6(e) and *Sells* prohibit the assignment of Justice Department attorneys who participated in the prior grand jury investigation to this subsequent civil litigation without first obtaining a court order. We disagree.

Rule 6(e) of the Federal Rules of Criminal Procedure codifies the traditional rule of grand jury secrecy.[8] It pro-

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[7] It is important to note that we continue to support the policy against piecemeal appellate review. *See In re 1985 Grand Jury Proceedings,* No. 85-5218, slip op. at 5 (8th Cir. Dec. 20, 1985). The present case, however, contains that rare circumstance in which a party's rights may be effectively lost if the case is erroneously permitted to go to trial.

[8] Rule 6(e) provides, in pertinent part, as follows:

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand

vides that grand jurors, Government attorneys and their assistants, and other grand jury personnel are forbidden from disclosing matters occurring before the grand jury.

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jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand jury, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring

There are several exceptions to this nondisclosure rule. Under Rule 6(e)(3)(A)(i), disclosure may be made without a court order to "an attorney for the government for use in the performance of such attorney's duty." In addition, Rule 6(e)(3)(C)(i) permits courts to order disclosure.

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before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

In *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), the Supreme Court addressed the question of whether attorneys for the Civil Division of the Justice Department may obtain automatic 6(e)(3)(A)(i) disclosure of grand jury materials, compiled with the assistance of other Justice Department attorneys, for the purpose of preparing and pursuing a civil suit, or whether they must seek a 6(e)(3)(C)(i) court order for access. The Court held that automatic 6(e)(3)(A)(i) disclosure is limited to use by those attorneys who conduct the criminal matters to which the materials pertain. *Id.* at 427. Therefore, Civil Division attorneys may obtain access to grand jury materials, prepared with the assistance of other Justice Department attorneys, for use in a civil suit only by moving for court-ordered disclosure under Rule 6(e)(3)(C)(i) and by showing the particularized need required by that Rule. *Id.* at 420.[9]

In the present case, the threshold question is whether the assignment to a civil case of the same attorneys who participated in a prior grand jury investigation even constitutes disclosure of matters that occurred before the grand jury. We hold that it does not. For there to be a disclosure, grand jury matters must be disclosed to *someone*. We do not believe that an attorney's recollection of facts learned from his prior grand jury participation can be considered disclosure so as to invoke the prohibition of Rule 6(e).

ADM's and Nabisco's argument essentially comes down to saying that Government attorneys who participate in a grand jury proceeding must be prohibited from litigating a subsequent civil case involving companies who had been part of the grand jury investigation. We do not believe

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[9] *See also United States v. Baggot*, 463 U.S. 476, 483 (1983) (holding that an Internal Revenue Service investigation to determine a taxpayer's civil tax liability is not "preliminar[y] to or in connection with a judicial proceeding" within the meaning of Rule 6(e)(3)(C)(i), and therefore no disclosure is available under that Rule).

that Rule 6(e), as interpreted by *Sells*, can be read to reach that far.[10]

Sells concerned the use of grand jury materials by Civil Division attorneys in the Justice Department who had not participated in the grand jury proceedings. In that case, in other words, matters occurring before a grand jury were disclosed by attorneys who participated in the grand jury to attorneys who had not. Here, on the other hand, the same attorneys who participated in the grand jury proceedings were assigned to the subsequent civil litigation. *Sells* simply does not support ADM's and Nabisco's argument that such assignment constitutes disclosure of grand jury matters in violation of Rule 6(e).[11] In the *Sells* case there were two sets of attorneys, and a disclosure occurred, whereas in the present case there is only one set of attorneys, and no disclosure. Furthermore, our decision is strengthened by the fact that the civil antitrust suit brought by the Government against ADM and Nabisco alleging an unlawful acquisition or merger is a distinct and separate action from the prior grand jury investigation for price-fixing. In *Sells*, grand jury materials were being sought for use in the civil phase of the same matter that had been investigated by the grand jury, that is not the case here. Accordingly, we affirm the district court's ruling that the assignment of Justice Department attorneys who

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[10] Furthermore, ADM's and Nabisco's reliance on *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973), is misplaced. *McDaniel* has nothing to do with Rule 6(e). It merely holds that because the federal prosecutor had read McDaniel's immunized state testimony, his federal conviction was obtained in violation of his fifth amendment rights.

[11] The Supreme Court expressly stated that *Sells* did not address the "continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." *United States v. Sells Engineering, Inc.*, 463 U.S. at 431 n.15. Clearly, then, it also did not address the issue presented here, whether the assignment to a civil case of the same attorneys who participated in a prior grand jury investigation amounts to a disclosure in violation of Rule 6(e).

participated in a prior grand jury investigation to this current civil case, without a court order, does not violated Rule 6(e).

ADM and Nabisco also contend that the Justice Department attorneys prosecuting this civil case have continuously possessed grand jury documents in their offices and files in violation of Rule 6(e). The district court ruled that the Justice Department had engaged in questionable storage practices, but had not violated Rule 6(e). On the record presented to us, we agree with the district court's conclusion.

An Impounding Order was entered instructing the Antitrust Division to store the grand jury materials in Washington, D.C. There has been no showing that these materials have been disclosed in violation of Rule 6(e), or that Government attorneys are making continued use of them in this civil case.[12] All that the record shows is a continued possession of some documents that the Government attorneys have a right to possess.[13]

III. CONCLUSION.

Based on the foregoing reasoning, we affirm the district court's denial of ADM's and Nabisco's motion for dismissal, or for alternative relief.

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[12] In *In re Grand Jury Investigation*, 774 F.2d 34, 40 (2d Cir. 1985), the Second Circuit concluded that continued access to, and use of, grand jury "materials by the attorneys pursuing the civil matter to refresh their recollection as to documents or testimony to which they had access in the grand jury proceeding" amounts to further disclosure requiring a Rule 6(e) court order. We believe that the present case is different from *In re Grand Jury Investigation*, *supra*, because it does not contain a clear showing of continued use of grand jury materials by attorneys assigned to the civil litiation to refresh their recollection.

[13] We note that the Government states that the attorneys who had access previously have not used and will not use grand jury materials in this case, except as has been required to respond to defendants' discovery efforts on this issue.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 83-51-D

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARCHER-DANIELS-MIDLAND COMPANY
and NABISCO BRANDS, INC.,

Defendants.

FILED
1984 MAR 29 PM 3:35

RULING ON MOTION TO DISMISS

Defendants' motion to dismiss was submitted on briefs and oral arguments March 27, 1984.

Defendants seek a dismissal without prejudice of the complaint as a sanction for and cure of an alleged violation by the government of the doctrine established by the Supreme Court in *United States v. Sells Engineering, Inc.*, ___U.S. ___, 103 S. Ct. 3133 (1983).

Fed. R. Crim. P. 6(e)(2) prohibits an attorney for the government from disclosing matters occurring before a grand jury, except as otherwise provided. Disclosure may be made "to an attorney for the government for use in the performance of such attorney's duty." Fed. R. Crim. P. (6)(e)(3)(A)(i). In *Sells*, the Court held that the disclosure permitted by (A)(i) "is limited to use by those attorneys who conduct the criminal matters to which the materials

pertain." *United States v. Sells, supra,* 103 S. Ct. at 3140. Disclosure may not be made under (A)(i) to a government attorney conducting a civil matter, even if the civil matter arises out of the same facts investigated by the grand jury.[1]

In this case the government has filed a complaint alleging that defendants violated section 1 of the Sherman Act, 15 U.S.C. § 1, and section 7 of the Clayton Act, 15 U.S.C. § 18. The allegations arise from a lease agreement entered into between the defendants in June of 1982. The government contends that the agreement is an unreasonable restraint of trade in violation of section 1 of the Sherman Act and that the agreement is an "acquisition," the effect of which may be substantially to lessen competition in violation of section 7 of the Clayton Act. The relevant market is the high fructose corn syrup (HFCS) market in the United States. Both defendants were manufacturers of HFCS, and under the lease agreement defendant Archer-Daniels-Midland Company (ADM) leased from defendant Nabisco Brands, Inc. (Nabisco) its two HFCS manufacturing facilities.

Back in 1979-80 a federal grand jury conducted an investigation to determine if any firms in the corn wet milling industry, of which defendants were a part, were engaged in price fixing in violation of section 1 of the Sherman Act. Among the evidence placed before the grand jury were documents obtained from ADM and Nabisco. The grand jury concluded its investigation in late 1980 and returned no indictments.

Justice Department Antitrust Division personnel who worked on the grand jury investigation have worked or are working on this civil case. They are five lawyers, an economist and a paralegal. Also, an economist working on this case who did not work on the grand jury investigation was the recipient of a disclosure of matters that occurred before the grand jury in violation of Fed. R. Crim. P.

6(e)(2). The improper disclosure was made by one of the lawyers in this case who also worked on the grand jury investigation. However, the disclosure did not occur in the context of this case; it occurred in the context of another "acquisition" investigation involving some other firms in the corn wet milling industry. Nothing presently before the court suggests that there has been any other disclosure of matters occurring before the grand jury by persons who worked in the grand jury investigation, including lawyers working in this case.

The government contends that matters occurring before the grand jury are not relevant to the issues in this case, and that it has not used matters that occurred before the grand jury in this case. Defendants contend otherwise. The court is not able, on the record before it, to reach a conclusion on the relevancy to this case of matters that occurred before the grand jury.[2] However, reaching a conclusion of this relevancy question is not necessary to dispose of the pending motion.

The fighting issue raised by the pending motion is whether a prohibited disclosure within the meaning of Fed. R. Crim. P. 6(e) and the *Sells* decision occurs when a lawyer who attended the grand jury later conducts civil litigation in which he might make use of his knowledge of matters that occurred before the grand jury. In *United States v. Sells, supra*, 103 S. Ct. 3141 n. 15, the Court stated:

> This case involves only access by Civil Division attorneys who played no part in the criminal prosecution of respondents. It does not present any issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution. We decline to address that problem in this case.

In his dissent, in which three other justices joined, the Chief Justice did address the problem:

> [I]t is reasonable to read today's decision as allowing any Justice Department attorney who has participated in the grand jury investigation or prosecution—and thus already has had access to the grand jury materials—to make further use of those materials in preparing and litigating a related civil case.

Id. at 3116.

The problem in this case is not the same as the one noted in the *Sells* majority's footnote and in the dissent because this case is not a civil phase of the same matter that was investigated by the grand jury. However, it appears that Department of Justice personnel assigned to this case who also worked on the grand jury investigation might have occasion to draw on their knowledge of matters that occurred before the grand jury in respect to some factual issues in this case. *See* footnote 2, *supra*.

It is this court's conclusion that even if the reach of *Sells* extends to the situation described in *Sells* footnote 15, it stops short of the far more attenuated situation involved in this case. Furthermore, assuming without deciding that it is improper for the Justice Department to assign to a civil case a lawyer who might draw on his knowledge of grand jury evidence, remedies less radical than dismissal should be sufficient.

Defendants' motion to dismiss without prejudice is denied, and the discovery stay entered by Magistrate Longstaff on February 21, 1984, is now lifted.

In its response to defendants' motion to dismiss, plaintiff seeks to be awarded expenses incurred in defending the motion under Fed. R. Civ. P. 11. Plaintiff contends that filing the motion was an indefensible abuse of judicial process. I do not agree. Although I have denied the motion,

the contentions advanced by defendants are fairly arguable. The plaintiff's request to be awarded fees is denied.

DATED this 29th day of March, 1984.

/s/ HAROLD D. VIETOR

HAROLD D. VIETOR

United States District Judge

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[1] The government's civil attorney may seek grand jury materials by court order upon a showing of a particularized need. Fed. R. Crim. P. 6(e) (3) (C) (i); *United States v. Sells Engineering, Inc.*, ___U.S. ___, 103 S. Ct. 3133, 3148-49 (1983).

[2] This case is a type of merger case and does not involve allegations of price fixing, which was the subject of the grand jury investigation. However, the United States Department of Justice Merger Guidelines issued June 14, 1982, contain the following: "The Department is more likely to challenge a merger in the following circumstances: 1) Firms in the market previously have been found to have engaged in horizontal collusion regarding price * * *." Part III, Paragraph C3, at 26-27. Also, at one point in the investigation of this case a lawyer working on this case who had worked on the grand jury investigation directed that some grand jury exhibits be delivered to him. The delivery was not consummated, however. Also, as noted in the body of this ruling, in another "acquisition" or merger investigation use was made of matters that occurred before the grand jury. It would appear, therefore, that defendants' concerns that the government has used or will use, in some manner, information it gained in the grand jury investigation are well founded.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 83-51-D

UNITED STATES OF AMERICA,

Plaintiff,

v.

ARCHER-DANIELS-MIDLAND COMPANY
and NABISCO BRANDS, INC.,

Defendants.

Filed

Nov-6 PM 3:35

RULING DENYING RENEWED MOTION TO DISMISS OR FOR ALTERNATIVE RELIEF

Defendants' renewed motion to dismiss complaint without prejudice, or for alternative relief, pursuant to *United States v. Sells Engineering*, 103 S. Ct. 3133 (1983), is before the court for ruling.

A review of the briefs and the discovery material leads the court to conclude that the injunctive relief granted on April 20, 1984, remains adequate, and that neither dismissal nor any of the alternative relief sought by defendants is appropriate.

It is not a violation of Fed. R. Crim. P. 6(e)(2), as interpreted in *United States v. Sells, supra*, for an attorney

who attended the grand jury to participate in this case, which is unrelated to the grand jury investigation.

The record discloses questionable "storage" practices by the Justice Department in respect to grand jury materials, but does not disclose any violation of Rule 6(e)(2) that is material to this lawsuit.

Defendants' motion to dismiss or for alternative relief is denied in its entirety.

DATED this 6th day of November, 1984.

/s/HAROLD D. VIETOR
HAROLD D. VIETOR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 83-51-D

UNITED STATES OF AMERICA

Plaintiff,

vs.

ARCHER-DANIELS-MIDLAND COMPANY
and NABISCO BRANDS, INC.,

Defendants.

HEARING ON MOTIONS

Second Floor Courtroom
U.S. Courthouse
East First and Walnut
Des Moines, Iowa
Friday, April 20, 1984

The above-entitled matter came on for hearing at 1:30 p.m. BEFORE:

THE HONORABLE HAROLD D. VIETOR, Judge

* * * *

in this case is not the same as the one noted in the Sells majority footnote and in the dissent, because this case is not a civil phase of the same matter that was investigated by the grand jury. I think that's correct. This is not. In fact, the operative facts giving rise to this lawsuit didn't

occur until after the grand jury had finished its work. As I understand, the grand jury was looking into the possibility of price fixing, or something along those lines, in the industry.

MR. JOHNSON: I don't know, maybe Your Honor did mean to make a finding in that regard. It seemed to us there is a continuum of relatedness. The Court said there wasn't enough on record to make a determination on this point on relatedness. In our view it's hard to identify what the matter was in that grand jury because the grand jury never returned an indictment, and the government makes some representations as to what the, quote, "dispute or matter was." But all we know is that many of the matters, in the plural, that were involved in that grand jury clearly are involved here.

THE COURT: What I said was this: "The government contends"—going to the bottom of page two—"the government contends that matters occurring before the grand jury are not relevant to the issues in this case, and that it has not used matters that occurred before the grand jury in this case. Defendants contend otherwise; that the Court is not able, on the record before it, to reach a conclusion on the relevancy of this case of matters that occurred before the grand jury."

Now that, I think is correct. There may have been some matters before that grand jury that are somehow relevant to this case, but it doesn't alter the fact that the grand jury investigation was—this case is not the civil phase of the same matter. It may be there is a little overlapping, it may be that some of the matters that went before the grand jury in that price fixing investigation will in some way—and, you know, I'm grasping at imagination here—but in some way be relevant in this case, but that doesn't alter the fact that we're dealing here with the antitrust impact of what I have now held to be an acquisition; and

the grand jury investigation, I was told at the prior hearing, was strictly into price fixing.

MR. JOHNSON: That's precisely our point, Your Honor. The government, through an attorney who didn't participate in the grand jury, has told you that, but there is no credible evidence in the record as to what the subject matter of that grand jury was, other than the fact it arose under the Sherman Act. We can infer that because the antitrust division handled it, and we know what they asked for. The matters to our knowledge are simply the subsequent matters on what we responded, and I don't know how you can characterize them as price fixing or any other—

THE COURT: To be candid, I accepted the government counsel's representation that that was investigation into the

* * * *

and in his affidavit he said he was not going to inquire into any susbstantive grand jury areas. He filed that affidavit with our protective order motion.

Rule 6(e) would preclude him from asking people who are involved in the grand jury, what was the subject matter of the grand jury. And so the question of what the grand jury investigated can't not be inquired into without a violation of Rule 6(e) itself. It's the big irony here, Your Honor. We are not using the documents or the grand jury record in any way in this case. That has nothing to do with this case. We've subpoenaed documents from both Defendants.

THE COURT: Well, if you're not using, and you don't intend to use the documents, then what did Mr. Aldrich ask to have grand jury documents delivered to him for?

MR. JOST: MR. Aldrich is a very good lawyer, Your Honor, and he had a prior matter in the same industry,

and feeling a need to be extra cautious and doubly certain, he asked to review some materials. I don't know what they were.

THE COURT: He was going to use them, wasn't he?

MR. JOST: He was going to, but he didn't

THE COURT: But he came within—at least you say he didn't.

MR. JOST: He came within the act of the will of doing it, but I don't know that an attempt to do something that would violate Rule 6(e) violates Rule 6(e), or that would attempt to violate Rule 6(e). We're not using that. I have no interest in getting access to those documents.

What we're bound up with here today is this whole notion that the assignment of people to this case, who worked in the grand jury, somehow violates Rule 6(e). Rule 6(e) deals with disclosure of grand jury material. Your Honor held that this is not even—this case is not even the issue reserved in the Sells case, so it reeks this common assignment of people to this case and grand jury. You have to first cover the footnote situation and then you'd have to go further.

THE COURT: There's two things. There's the common assignment question, and then there's the question about whether there in fact has been use of grand jury materials in this case. It seems that grand jury materials keep cropping up in the offices of government lawyers handling this case. Now, that's true.

MR. JOST: Your Honor, the documents that crept into my office, as you say, crept up as a result of Defendants' discovery efforts.

THE COURT: I understand you have explanations. Well, they were in the hands of Mr. Sawyer?

MR. JOST: That's true.

THE COURT: And he's an economist of the department who's working on this case, isn't he?

MR. JOST: Yes.

THE COURT: And his use of those materials in connection with the other matter had expired, isn't that true?

MR. JOST: Yes.

THE COURT: Okay. What did he have them for?

MR. JOST: I think everybody in the Department of Justice has files from old investigations. I had a grand jury several years ago myself that I only recently cleared out some of the transcripts so I could make room for some of the documents submitted by Defendants in this case.

MR. JOHNSON: I won't even add.

MR. JOST: Different industry.

THE COURT: You have had some unauthorized disclosure, whether in this case or not, of the grand ju: materials?

MR. JOST: If we track this down—

THE COURT: Isn't that true?

MR. JOST: To the extent he didn't turn them back—assuming he got them in connection with the other investigation—acquisition, yes, then there was unauthorized disclosure.

THE COURT: What about the paralegal and the grand jury?

MR. JOST: What about the paralegal that got the grand jury material for Mr. Aldrich? Rule 6(e) forbids nonattorneys to utilize grand jury materials other than in assisting somebody in the enforcement of the federal criminal law. If going to some documents with which that paralegal—which that paralegal was authorized to use in

connection with a grand jury a year or two earlier, and merely picking up some materials and delivering them to someone else, is a violation of the rule dealing with utilization, then, yes.

THE COURT: If that's all she did. How do you know that's all she did?

MR. JOST: If she did any more, she does not remember it.

THE COURT: Has she testified to that under oath?

MR. JOST: No, Your Honor. But why don't we leapfrog a little bit down the line here and talk about where we're going with this? What's the purpose of this discovery? What should a court do when there's unauthorized disclosure? The Court should stop that disclosure.

THE COURT: I have one more question and then I'm going to let you finish your argument. Your own policies in looking at a potential acquisition violation—

MR. JOST: Department policies?

THE COURT: Yes—reflect that among the things you want to look into is the history of the—

MR. JOST: Antitrust history.

THE COURT: —in connection with possible price rigging. Isn't that policy in your department?

MR. JOST: Yes, Your Honor, I don't dispute that that's clear. The reason for that, because if there was price fixing, it could be relevant to the case. I'm sure if the grand jury found price fixing and indicted—

THE COURT: I know there was no indictment. It doesn't mean the grand jury didn't find some evidence of it. Lots of times there's evidence of the crime but it's not adequate to convince them that an indictment should be returned. So the mere fact that nobody was indicted

doesn't mean that that grand jury material doesn't include some evidence of price rigging.

MR. JOST: It's been represented to me by people who handled the grand jury—they deny finding evidence of collusion.

THE COURT: No evidence at all? A year and a half and not a scrap?

MR. JOST: When seven hundred thousand documents come in, it's an overwhelming burden to deal with them in any fashion, and it's not surprising that a grand jury could operate for a period of time.

THE COURT: I don't know. Maybe every industry—every member of every firm in the industry came out clean as a hound's tooth, but it's also possible that they were less—there was some evidence of price rigging, but perhaps inadequate evidence to justify an indictment. That's all I'm suggesting. So the mere fact there was no indictment of anybody doesn't mean the grand jury materials can't be a little mine of relevant information.

* * * *

and how far ranging those depositions are, and if Defendants would go beyond the range I'm trying to express here is appropriate, of course, the government would have the right to come back in and say, "Wait a minute, Judge. This is going too far, and they've gotten the depositions they really need, it revealed nothing, and now they're just on a wild fishing expedition." The Court can be very responsive to a second motion for protective order if the ruling I'm now making is abused. I think you understand what I'm saying.

MR. JOHNSON: I do, Your Honor.

THE COURT: On the application for preliminary injunction, normally one does not issue a preliminary injunction to enjoin people from doing what the law says

they cannot do anyway, and most certainly if there isn't any evidence of it—there's a little evidence here that there's probably been some violation. How much, we don't know. I hope not any more than has been indicated by Mr. Jost. That frankly is my expectation.

I image that the depositions won't discover much more than what Mr. Jost has already indicated to us here, but because there has been some missteps in the Department of Justice concerning the grand jury materials, I think it's appropriate to grant the portion of the motion for preliminary injunction which really isn't controverted, and I don't think I have to enumerate the—in support of what I'm going to enjoin, I don't think I have to enumerate the facts underlying the data phase standards for issuance of a preliminary injunction, and the plaintiff and each attorney or assistant to such attorney representing the plaintiff in this case and to whom no grand jury material has previously been disclosed or made accessible are hereby enjoined and restrained from requesting, receiving, reviewing, reading or otherwise obtaining any grand jury material except as expressly permitted by a Court under Rule 6(e)(3)(c) of the Federal Rules of Criminal Procedure, and each government attorney, including any assistant to such attorney, who represents plaintiff in this case and to whom any grand jury material has previously been disclosed, or made accessible, whether authorized by law or not, is hereby enjoined and restrained from disclosing or making accessible any grand jury material to any government attorney or assistant who is prohibited from receiving such grand jury material under the provisions of the preceding portion of this preliminary injunctive order.

That's it. I am not going to preliminarily enjoin further participation in this case of any lawyer or assistant to the lawyer who has previously had disclosed to him or her or had access to grand jury material.

Is there any need to put a 30-day limitation on the limited preliminary injunction I've ordered? I've actually ordered nothing more than the law provides anyway.

APPENDIX C
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
JUDGMENT

No. 85-1050SI

UNITED STATES OF AMERICA,

Appellee,

v.

ARCHER-DANIELS-MIDLAND CO. and NABISCO BRANDS, INC.,

Appellants.

Filed—March 24, 1986

Appeal from the United States District Court for the Southern District of Iowa

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

A True Copy.

ATTEST: /s/Robert D. St.Vrain

ROBERT D. ST.VRAIN

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

Raymond W. Phillips
Don O. Burley
Consumer Affairs Section
Antitrust Division
United States Department of Justice
Washington, D.C. 20530
(202) 724-6885

Counsel for Plaintiff

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 80-2139

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CPC INTERNATIONAL, INC., *et al.*,

Defendants.

Filed
August 7, 1981

PROTECTIVE ORDER

1. Whereas, a grand jury impaneled in the Northern District of California investigating possible violations of the antitrust laws, 15 U.S.C. § 1 *et seq.*, subpoenaed documents from various companies and interrogated various witnesses;

2. Whereas, these documents are in the custody and control of attorneys of the Department of Justice pursuant

to an Impounding Order entered by Chief Judge Robert F. Peckham on March 7, 1980, in *In Re Grand Jury Proceeding* CR33-17M;

3. Whereas, the grand jury has concluded its investigation with the Department of Justice determining that it would not seek the return of an indictment;

4. Whereas, defendant American Maize-Products Company filed a motion for a protective order pursuant to Rule 26(c), Federal Rules of Civil Procedure, and Rule 12, Federal Rules of Criminal Procedure.

5. Whereas, at a hearing on February 6, 1981, this Court denied the motion of American Maize-Products Company to preclude the government attorneys engaged in the prosecution of this civil action from viewing grand jury materials, but indicated that American Maize-Products Company should consult with plaintiff to attempt to reach agreement on a mutually agreeable protective order.

6. Whereas, the grand jury materials are being used by the attorneys of the Department of Justice engaged in the prosecution of the captioned matter;

IT IS HEREBY ORDERED that, except as provided herein, plaintiff may not make disclosure of such grand jury materials including any documents produced before the grand jury, testimony before the grand jury or any information contained therein that has not already been made public.

IT IS FURTHER ORDERED that plaintiff may make disclosure of such grand jury materials to personnel employed by the Department of Justice and the Federal Trade Commission as may be necessary for such persons to assist in the conduct, prosecution or settlement of this suit, but that any such person shall not make any disclosure to anyone else. Plaintiff shall make no other disclosure except upon court order. Plaintiff shall give fifteen (15) days notice to each of the companies subject to the grand jury

investigation before application for such an order is filed by the plaintiff that seeks any other disclosure of grand jury materials.

IT IS FURTHER ORDERED that plaintiff shall give notice to each of the companies subject to the grand jury investigation of any application by anyone else that seeks access to or disclosure of the grand jury materials including any documents produced before the grand jury, testimony before the grand jury or any information contained therein that has not already been made public.

APPROVED: /s/Raymond W. Phillips
Attorney
United States Department
of Justice

DATED: August 7, 1981

APPROVED: /s/Patrick J. Mahoney
Attorneys for Defendants

IT IS SO ORDERED

DATED:

/s/Robert H. Schnacke
United States District Court Judge
for the Northern District of California

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. 80-2139

UNITED STATES OF AMERICA,

Plaintiff,

v.

CPC INTERNATIONAL, INC., *et al.*,

Defendants.

Filed Aug. 26, 1983

ORDER DENYING KOERNER'S MOTION FOR DISCLOSURE OF GRAND JURY MATERIAL

This matter coming on before the Court pursuant to the motion of John E. Koerner & Co., for production of copies of subpoenas duces tecum issued by the grand jury and for specified information concerning witnesses who appeared before the grand jury and their testimony;

The Court having examined the pleadings and briefs submitted by Movant and the opposing parties and having heard the argument of counsel;

The Court finds that the material requested by Koerner is material relating to matters occurring before the grand jury and therefore subject to Federal Rule of Criminal Procedure 6(e). The Court finds that the Movant does not need this material for assistance in another judicial proceeding or to avoid injustice in another judicial proceeding and that the Movant has failed to demonstrate particularized need for these materials. The Court also finds that

the need for secrecy continues and outweighs any demonstrated need by the Movant;

IT IS HEREBY ORDERED that the motion is DENIED.

/s/Robert H. Schnacke
Honorable Robert Schnacke
United States District Court

COMPARISON OF SCOPE OF ADM CORN PRODUCTS GRAND JURY SUBPOENA WITH SCOPE OF DISCOVERY IN U.S. v. ADM and NABISCO

Grand Jury Subpoena	Comparable U.S. v. ADM Discovery
Time Period	Time Period
January 1, 1973 to January 28, 1980	The time period for each and every discovery request and deposition by plaintiff has overlapped in whole or in part the time period of the Grand Jury Subpoena Civil Investigative Demand - Documents ["CID"] - January 1, 1977 to August 3, 1982 Civil Investigative Demand-Interrogatories ["Interrogatories"] - varies, but numerous questions ask for data beginning January 1, 1977 Plaintiff's First Request For Production Of Documents By ADM ["First Rule 34 Request"] - January 1, 1979 to April 15, 1983 Plaintiff's Rule 30(b)(6) Interrogatories and Second Request For Documents Under Rule 34 ["Second Discovery Request"] - varies, but numerous questions seek data for period 1970-1983 Plaintiff's Deposition Questions - varies, but plaintiff routinely asks questions relating to period 1970 to date.

Annual Reports, Past Acquisitions

2. The company's annual reports to stockholders, Form 10-K annual reports, and any reports filed by the company with the Securities and Exchange Commission *concerning acquisition of the stock or assets of a company engaged in the manufacture or sale of corn products.* (Emphasis added) [Note: "Corn products" is defined to include high fructose corn syrup]

Annual Reports, Past Acquisitions

Numerous specifications and questions relate to the contents of annual reports and to past or future acquisition plans. The following are representative:

CID Specification 3: All documents that relate to your company's interest in the expansion of its corn wet milling business by acquisition of existing firms, lease of corn wet milling plants, expansion of existing plants, construction of new plants, or by any other means.

Second Discovery Request, Interrogatory 14: Within the last ten years, what plants, if any, has your company acquired (by lease, purchase, or otherwise) that produced HFCS?

CID Specification 14: A copy of your company's annual reports and audited financial statements including balance sheets, income statements, cash flow statements, and all explanatory notes.

Management, Sales and Marketing Organization

3. Documents sufficient to show the company's management structure and organization, and any modifications thereto during the subpoena period, including but not limited to charts, lists, and other documents showing the names, titles, duties, responsibilities, or supervisory relationships of directors, officers, supervisory or managerial employees, and sales executives.

11. Documents sufficient to describe the company's corn products sales organization during the subpoena period, including brokers used by the company.

Management, Sales and Marketing Organization

CID Specification 15: A copy of all organization charts for your company.

First Rule 34 Request Specifications 12 and 13:

12. Documents sufficient to identify the full name and current or last known home and business addresses and telephone numbers of each person [sales and marketing personnel] identified on documents numbered ADM 000702, ADM 003126, ADM 003127, ADM 003128, and 004549 (copies attached), as well as Mr. Leonard T. Lewis, and documents sufficient to show whether each such person is currently employed by your company or Nabisco.

13. A copy of current organization charts for your company that identify persons whose responsibilities relate in whole or in part to the production, marketing or sale of HFCS.

Facilities, Products, Sales Volume and Territory

10. For each plant owned or operated by the company that has been engaged in the production of corn products at any time during the subpoena period, documents sufficient to show the following for the entire subpoena period:

(a) name and location;
(b) types of corn products produced;
(c) productive capacity;
(d) actual annual production by units or volume of each type of corn product;
(e) geographic areas within which the plant sold or shipped corn products;
(f) name, title, social security number, date and place of birth, tenure, and last known business and residence address of (i) the plant manager and (ii) the person or persons primarily responsible for setting production levels.

Facilities, Products, Sales Volume and Territory

Interrogatories Question 1: Describe in detail your company's corn products manufacturing facilities including for each plant:

(a) its location;
(b) its sales territory;
(c) its total grind capacity in bushels and tons;
(d) its finishing capacity stated separately for unmodified corn starches, modified corn starches; corn syrups, dextrose, 42% HFCS, and 55% HFCS; and
(e) for each year from 1977, its annual production (in units) of

(1) unmodified corn starches,
(2) modified corn starches,
(3) corn syrups,
(4) dextrose,
(5) 42% HFCS,
(6) 55% HFCS, and
(7) other corn products (identifying each product separately).

Customer Lists and Volumes

12. Documents sufficient to show separately for each year during the subpoena period the company's fifty largest customers for each type of corn starch product, their business addresses, and the dollar amount of sales to each. [Note: "Corn Starch Product" is defined to include high fructose corn syrup]

Pricing Issues

13. Documents sufficient to show the name, title, social security number, date and place of birth, tenure, and last known business and residence address of each person who at any time during the subpoena period was responsible for establishing, recommending, reviewing, or approving prices, price formulas, price changes,

Customer Lists and Volumes

Interrogatories, Question 5: For each year from 1977, for each product line listed in (e)(1) through (7) of Interrogatory 1, state:

(a) your company's sales in dollars and production units to persons within the United States;

(b) your company's foreign sales in dollars and production units; and

(c) the names and addresses of your company's twenty-five largest dollar volume customers.

Pricing Issues

Second Discovery Request, Document Specification 1:

Documents sufficient to show all of your company's list prices for 42% HFCS, 55% HFCS, or any other grade of HFCS from January 1, 1970 to date.

price quotations, bids, or terms and conditions of sale for any corn product sold by the company, with a description of the scope and nature of the pricing responsibilities of each person named.

14. Documents sufficient to describe each method, procedure, or formula used by the company to calculate prices or other terms and conditions of sale for corn starch products at any time during the subpoena period, and the dates when it was effective.

15. One copy of each price catalog, list schedule, book, announcement, or other document, including each amendment, modification, or supplement thereto, that lists the company's prices or other terms and conditions of sale during the subpoena period for each of the corn starch products sold by the company.

16. All documents that refer or relate to the initiation, consideration, or approval of changes in prices or terms and conditions of sale of the corn starch products sold by your company during the subpoena period.

Plaintiff's depositions have further explored in great detail the precise pricing issues addressed by Questions 13 to 17 and 27 of the Grand Jury Subpoena, including: pricing responsibilities, methods, procedures or formulas used to calculate prices, circumstances and procedures relating to changes in prices, and prices and methods of pricing utilized by other companies. Presented below is a selected sample of the types of pricing questions asked in depositions by just one of the government's attorneys, Bruce Yamanaga, a grand jury crossover attorney. This sample illustrates the types of issues covered, but does not, of course, present the complete detail of all pricing questions asked by Mr. Yamanaga or the other government attorneys. Questions related to the pricing of high fructose corn syrup have filled more than half of a number of depositions.

Selected Deposition Questions
by Bruce Yamanaga

Deposition of Richard A. Bandy at 41-43:

Was there a list price for high fructose corn syrup

17. All documents that refer or relate to:

(a) prices or other terms and conditions of sale of corn products sold by any other corn products manufacturer;

(b) any method, procedure, or formula utilized by any other corn products manufacturer to calculate prices or other terms and conditions of sale for corn products;

(c) any efforts undertaken by you to learn the prices or terms and conditions of sale of any other corn products manufacturer or techniques used to discover such information.

while you were at Clinton?
Who established that price?
Were you informed of that price?
Who did you receive [written price announcements] from?
How often did you receive them?
Are you familiar with the process used by Clinton to arrive at a list price for high fructose corn syrup?
Did Clinton sell all its high fructose corn syrup at this price?
Approximately what percentage, if any, of high fructose corn syrup did Clinton sell at list price in your area?
Did you have any authority to offer prices for high fructose corn syrup other than list price?
Did you ever sell high fructose corn syrup at Clinton other than at list price?

Bandy Dep. at 55-57:

At Clinton, did you ever use a formula price in the sale of high fructose corn syrup?
At Clinton, did you ever sell high fructose corn

27. All documents that refer or relate to identical, non-competitive, or collusive pricing by any corn products manufacturer.

syrup that was tied to a formula price?
Did you ever have an understanding with respect to a contract . . . in which a customer would obtain high fructose corn syrup at a formula price?
What do you understand formula pricing to be?

Deposition of Robert L. Allen at 19-21:

Did anyone tell you anything with respect to the pricing of the product?
Did anyone discuss pricing the product with you?
At that time [mid-1970's], did anyone at ADM give you any information with respect to how ADM would be pricing high fructose in the future?
Did anyone provide you with any information to give to your customers with respect to how high fructose would be priced in the future?

Allen Dep. at 34-36:

[D]o you attempt to keep abreast of the market price for high fructose corn syrup?
When you sell high fructose corn syrup, do you always sell at list price?

Where does this price below list price come from?
Do you get this price from your customers?
You refer to a competitive situation in which there was a price lower than list price?
Is that purely a matter of agreement between yourself and the customer?

Allen Dep. at 47:

Do you have any responsibilities for pricing high fructose corn syrup?
Are you aware of the processes whereby ADM determines the price for high fructose corn syrup?
Are you aware of the methods by which other corn wet millers determine the price for high fructose corn syrup?
Are you aware of how sucrose manufacturers set the prices of their products?

Allen Dep. at 49-51:

Do you determine the price of liquid sugar?
What factors do you consider when you determine that price?
Do you have a formula?

How do you price liquid sugar?
In your job do you have an opportunity to obtain information with respect to competitive offers for either high fructose or liquid sugar?
From your customers, from your salesman, from other salesmen?
Do you also get information from your salesmen?
Do you also get information from other salesmen?

Allen Dep. at 133-134:

You testified that you do sell high fructose corn syrup at list prices?
You don't sell all of your high fructose corn syrup at list, is that correct?
You sell high fructose at prices below list, do you not?
Does the percent of product that you sell at list vary by the season of the year?

Allen Dep. at 142-143:

I would like to turn to the second paragraph of that document, and to the first sentence, which reads "pricing policies here are the problem . . ." What did you mean by "pricing policies

here are the problem"?
Whose pricing policies are you referring to there?

Allen Dep. at 157-159:

The next sentence . . . refers to Cargill "quoting all over the board as they are just trying to get out of the gate." What did you mean by that?
When you say "whatever they felt like quoting" is that a lower price?
Is it unusual for a company to quote at whatever it wants to quote at?
Why was it unusual for Cargill to be doing that?

Allen Dep. at 165-166:

The reference to competitors "offering fixed pricing at 15 to 20 percent below their fixed sugar price . . ." does this means that the formula for 55 high fructose was tied to the sugar price with a 15 to 20 percent discount?
What does "fixed pricing" refer to?

Allen Dep. at 180:

What do you mean by forward coverage?

What does that entail? Selling a product at a fixed price?

Allen Dep. at 228-229:

Have you ever administered a contract that had price term "price date of shipment"?
What did that mean in the contract?
Would that be ADM list price on that day?
Who determines that price?
Have you ever administered a contract that had ["most competitive market price"] as a price term?
What was meant by that price term?

Allen Dep. at 235-236:

Did you ever go to a sales meeting in which people were discussing how ADM was doing relative to other competitors in HFCS sales?
Did you ever discuss the apparent pricing policies of other companies?
Outside of the setting of sales meetings, did you ever discuss that same topic with your superiors?

Deposition of Mark H. Mason at 52-56:

Are you involved in formulating contracts for the sale of HFCS by ADM?
Are you in that regard responsible for setting the price on those contracts?
Are you familiar with the spot market?
What does that mean?
Do you have any responsibilities for pricing HFCS on the spot market in your area?
Does ADM sell at less than list price?
During any time period?
Why is that?
Have you been given reasons why ADM sells fructose at less than list prices?
What were you told were the reasons ADM was selling HFCS at less than list price?
Can you recall instances in which ADM sold HFCS at less than list price?

Mason Dep. at 129:

What is meant by "first quarter ceiling price"?
What do you mean by [a price] "limited on the upside"?

And what do you mean by a downward limit?
And what do you mean by "a premium price above market"?
What do you mean by "price shots"?

Mason Dep. at 134:

What is forward pricing?

Contracts with other Producers

19. All documents, including, for example, dairies, appointment books, desk calendars, telephone logs, travel vouchers, and the like, that refer or relate to:

(a) Any written or unwritten, formal or informal agreement, contract, or understanding between you and any other corn products manufacturer.

Contracts with other Producers

Second Discovery Request, Document Specification No. 4:

A copy of each contract between your company and any other HFCS producer (located within or outside of the United States) entered into or in effect since January 1, 1978.

Trade Associations

20. Documents sufficient to show:

(a) the name and address of each trade association whose activities relate to the manufacture or sale of corn products of which the company is or was a member at any time during the subpoena period;

Trade Associations

Interrogatories, Question 2(a):

2. List:

(a) the name and address of every trade association of which your company is a member whose activities relate to corn wet milling.

Corn Products Market Studies and Analyses

25. All studies, surveys, and analyses of the corn wet milling industry or of the market for any corn product, including discussions or projections of supply and demand.

Corn Products Market Studies and Analyses

CID Specification Number 6: All documents that, in whole or in part, survey, study, analyze or assess the corn wet milling business or the market for corn products.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil. No. 83-51-D

UNITED STATES OF AMERICA

Plaintiff,

vs.

ARCHER-DANIELS-MIDLAND COMPANY
and NABISCO BRANDS, INC.

Defendants.

Second Floor Courtroom
U.S. Courthouse
East First and Walnut
Des Moines, Iowa
Tuesday, March 27, 1984

The above-entitled matter came on for hearing at 3:05 p.m. BEFORE:

THE HONORABLE HAROLD D. VIETOR, Judge.

* * * *

wrap up your argument on the motion to dismiss.

MR. JOST: I'd like to say that I keep looking for this disclosure that defense counsel says is happening all the time and regularly in this case. There's a reference in their reply brief at page 10 of self disclosure. There's some intimation that perhaps—at page 5 of their reply brief—that they're talking about disclosure that occurred during the grand jury investigation itself, but those things certainly don't make any sense.

While the grand jury investigation was ongoing, the attorneys and paralegals who were conducting it had a right and obligation. I think we probably took an oath that requires us to look at those grand jury documents, and that disclosure certainly isn't forbidden by Rule 6(e). And now we've got another case.

We've got the grand jury materials in the basement, unfortunately. I wish they were gone. We need storage space. But they've got nothing to do with this case. We're not using them. We don't have access to them, and there's no disclosure of them. 6(e) is simply inapplicable.

The Court, Supreme Court, in Sells set out the three problems that disclosure of grand jury materials in civil cases were caused. We addressed those in our brief, if there's any doubt in the Court's mind. You're asking me to hurry. I won't go through them again. We addressed those

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

INDEX NO.
83-51-D

UNITED STATES OF AMERICA

Plaintiff

vs

ARCHER-DANIELS-MIDLAND COMPANY
and NABISCO BRANDS, INC.,

Defendants

DEPOSITION UPON ORAL EXAMINATION OF:
Lawrence J. Aldrich

LOCATION:	Nixon, Hargrave, Devans & Doyle Lincoln First Tower Rochester, New York 14603
DATE:	May 14, 1984
TIME:	1:30 p.m.
REPORTED BY:	DEBORAH E. TRATTEL, R.P.R. Alliance Shorthand Reporters, Inc. Suite 1004, Alliance Building 183 Main Street East Rochester, New York 14604

APPEARANCES:

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THEODORE VOORHEES, JR., ESQ.,
of Counsel

• • •

fair to say that your involvement in the ADM investigation was attributable in part to the knowledge you had gained by that time in both the grand jury and the Staley investigation?

A. It certainly was attributable to my knowledge in the Staley investigation. Again, my role in the grand jury was

so limited that it would be fair to say very little of that knowledge can be transferred to ADM.

Q. And as you testified, I believe, your selection or at least your recommendation that Mr. Yamanaga be assigned to the ADM team was attributable in part to his knowledge gained in Staley and the grand jury?

MR. SMITH: That wasn't his testimony. His testimony was his knowledge of the industry.

A. I believe that is a factor, certainly.

Q. And Mr. Marx agreed with you?

A. He followed my recommendation. Whether he based that on that reason or not, I don't know.

Q. Okay. Back to the six- to eight- to ten-inch stack of documents that were retrieved at your request by Miss Clark. Are you absolutely certain, as you sit here today testifying under oath, that you did not review a single one of those documents?

A. No, sir, I am not absolutely certain.

Supreme Court, U.S.
FILED
MAY 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1840

In the Supreme Court of the United States

OCTOBER TERM, 1985

ARCHER-DANIELS-MIDLAND COMPANY AND NABISCO BRANDS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
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17 pp

QUESTIONS PRESENTED

1. Whether an order denying a motion to disqualify opposing government counsel in a civil case is immediately appealable under 28 U.S.C. 1291, where the asserted ground for disqualification is an alleged violation of Fed. R. Crim. P. 6(e).

2. Whether Fed. R. Crim. P. 6(e) prohibits government attorneys who participated in a grand jury investigation from preparing for and litigating a subsequent, unrelated civil suit involving parties to the grand jury investigation, where the attorneys' participation in the civil suit entails no use or disclosure of grand jury materials.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Carroll v. *United States*, 354 U.S. 394	9
Catlin v. *United States*, 324 U.S. 229	7
Cobbledick v. *United States*, 309 U.S. 323	9
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541	7
Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368	6, 7, 8, 9, 10
Flanagan v. *United States*, 465 U.S. 259	8
Gardner v. *Westinghouse Broadcasting Co.*, 437 U.S. 478	10
Grand Jury Investigation, In re, 774 F.2d 34, cert. granted *sub nom. United States* v. *John Doe I, Inc.*, No. 85-1613 (May 27, 1986)	11, 12
Kerr v. *United States District Court*, 426 U.S. 394	10
Richardson-Merrell, Inc. v. *Koller*, No. 84-127 (June 17, 1985)	9, 10
Rogers v. *Lodge*, 458 U.S. 613	10
Tiffany Fine Arts, Inc. v. *United States*, No. 83-1007 (Jan. 9, 1985)	9-10
United States v. *Hollywood Motor Car Co.*, 458 U.S. 263	9
United States v. *MacDonald*, 435 U.S. 850	9, 10
United States v. *Ryan*, 402 U.S. 530	10
United States v. *Sells Engineering, Inc.*, 463 U.S. 318	2, 3, 4, 5, 7, 11

Statutes and rule: Page

Clayton Act § 7, 15 U.S.C. 18 2
28 U.S.C. 1291 ..... 7, 8
28 U.S.C. 1292(a)(1) 10
Fed. R. Crim. P.:
Rule 6(e) 3, 4, 5, 6, 7, 8, 10
Rule 6(e)(3) 3

Miscellaneous:

U.S. Dep't of Justice, *Merger Guidelines* (1984) 2

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 785 F.2d 206. The orders of the district court (Pet. App. 15a-19a, 20a-21a, 22a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on February 24, 1986. The petition for a writ of certiorari was filed on May 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Prior to June 1982, petitioners Archer-Daniels-Midland Company (ADM) and Nabisco Brands, Inc. (Nabisco) were, respectively, the nation's second and third largest producers of high fructose corn syrup (HFCS). On June 12, 1982, Nabisco leased both of its HFCS manufacturing facilities to ADM, making ADM the nation's largest HFCS producer. Because the transaction involved a lease, petitioners did not notify the Antitrust Division of the Department of Justice before the transaction occurred. In July 1982, the Antitrust Division began a civil investigation to determine whether the lease agreement amounted to an acquisition in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. In December 1982, the government filed a civil complaint in the United States District Court for the Southern District of Iowa, alleging that the transaction violated both the Sherman and Clayton Acts. Pet. App. 3a, 16a.[1]

b. Six months later, this Court held in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 318 (1983), that attorneys from the Civil Division of the Department of Justice who did not participate in a grand jury investigation were required to obtain a

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[1] The Herfindahl-Hirschman Index (HHI) is generally accepted as the most accurate measure of industry concentration. Markets with an HHI of more than 1800 are considered highly concentrated, and, except in extraordinary cases, the Department of Justice will challenge acquisitions that result in an increase in the HHI of more than 100 points and a post-merger HHI substantially in excess of 1800. U.S. Dep't of Justice, *Merger Guidelines* 15 (1984). In this case, the HHI in the relevant market was at least 1610 prior to ADM's acquisition of the use of Nabisco's facilities and 2140 afterwards.

disclosure order under Fed. R. Crim. P. 6(e)(3) before they could review grand jury materials in connection with a civil proceeding stemming from matters investigated by the grand jury. Although the acquisition challenged in this case had not been the subject of any grand jury proceedings, and although the government attorneys who conducted the civil investigation had not reviewed or relied on any grand jury materials in doing so, petitioners filed a motion to dismiss the complaint based on *Sells*. They argued that *Sells* required dismissal of the complaint because several of the government attorneys involved in this case, as well as an economist and paralegal, had participated in an earlier grand jury investigation into possible price fixing in the corn wet milling industry, whose products include HFCS.[2] That grand jury had terminated without returning an indictment[3] 18 months prior to the acquisition that led to this civil antitrust suit, and all of the materials that the grand jury had reviewed were subject to an impoundment order entered by a district court in another proceeding. Pet. App. 2a & n.2, 16a. Nevertheless, petitioners argued that an attorney's recollection of matters occurring before the grand jury amounts to a "disclosure" of grand jury materials in violation of Rule 6(e) (Pet. App. 17a).

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[2] Petitioners' suggestion (Pet. 8) notwithstanding, neither court below found, and there is no evidence, that any government attorney made any use of grand jury materials except to respond to petitioners' discovery efforts on the Rule 6(e) issue. Pet. App. 13a.

[3] Petitioners err in suggesting (Pet. 6 & n.1) that the grand jury made a "finding relating to alleged price collusion in the [corn wet milling] industry."

The district court denied petitioners' motion (Pet. App. 15a-19a). The court pointed out that *Sells* left open the question whether the " 'continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution' " requires a Rule 6(e) disclosure order (Pet. App. 17a (quoting *Sells*, 463 U.S. at 431 n.15)). However, the court found that the issue in this case differed from the one left undecided in *Sells*, because this case involved an allegedly unlawful merger, rather than price-fixing, and therefore was not "a civil phase of the same matter that was investigated by the grand jury" (Pet. App. 18a; see *id.* at 19a n.2). Moreover, the court held that, even if "*Sells* extends to [such a] situation * * * it stops short of the far more attenuated situation involved in this case" (*id.* at 18a). Finally, the court concluded that, even assuming that it was improper for an attorney to participate in a civil suit that allowed him to draw upon his recollection of the evidence examined by a grand jury investigation, dismissal of the complaint was an inappropriate remedy (*ibid.*).

c. Two weeks later, petitioners moved to disqualify the government attorneys and staff who had participated in the earlier grand jury investigation, and sought an injunction prohibiting the government from disclosing any grand jury materials without a Rule 6(e) order. Ruling from the bench, the district court denied the disqualification motion (Pet. App. 29a). The court reiterated its earlier finding that "this case is not a civil phase of the same matter that was investigated by the grand jury" (*id.* at 22a), noting that "the operative facts giving rise to this lawsuit didn't occur until after the grand jury had finished its work" (*id.* at 22a-23a). Because of

"some missteps" in the government's handling of grand jury materials, however (*id.* at 29a),[4] the court did grant petitioners' request that the government be enjoined from disclosing grand jury materials in violation of Rule 6(e) (Pet. App. 29a). At the same time, the court observed that this portion of the motion "really isn't controverted" (*ibid.*),[5] and that its order amounted to "actually * * * nothing more than the law provides anyway" (*id.* at 30a). Petitioners did not appeal the district court's denial of their disqualification motion.

d. Petitioners then filed a third motion, in which they again sought dismissal of the case and disqualification of government counsel. They renewed their

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[4] The district court noted in its first order that an economist who was involved in this case had received grand jury materials in another case involving a different investigation from one of the attorneys involved in this suit (Pet. App. 16a-17a). The court also pointed out that one of the attorneys participating in this suit had (approximately at the time of ADM's acquisition, and well before this Court's ruling in *Sells*) directed that some grand jury exhibits be delivered to him. That attorney, however, never reviewed the materials. In the same order, the district court also found that there was no evidence suggesting that materials from the price-fixing investigation had ever been disclosed by any persons who were involved in the grand jury proceedings, including the government attorneys in this case (Pet. App. 17a).

[5] At a hearing on the motion, government counsel emphasized that this suit was unrelated to the earlier grand jury proceeding and that the attorneys and staff involved in this case had not used, and had no intention of using, any grand jury materials in any way in the preparation for or the litigation of this suit. Although the government saw no need for the injunction sought by petitioners, it did not strongly object to that aspect of their motion.

contention—already twice rejected by the district court—that the assignment to this case of attorneys and staff who had been involved in the earlier price-fixing grand jury investigation violated Rule 6(e). On November 6, 1984, the district court denied this motion, reiterating its earlier holdings that it did not violate Rule 6(e) for the attorneys who participated in the unrelated grand jury price-fixing investigation to participate in this case (Pet. App. 20a-21a). Although the court stated that the Department had followed "questionable 'storage' practices" regarding grand jury materials (*id.* at 21a), it found no evidence disclosing "any violation of Rule 6(e)(2) that is material to this lawsuit" (*ibid.*).

2. Petitioners appealed the district court's denial of their third motion, and the court of appeals affirmed (Pet. App. 1a-14a). At the outset, the court of appeals held that the district court's November 6 order denying petitioners' disqualification and dismissal motion was immediately appealable under the "collateral order" doctrine (Pet. App. 6a-8a). The court of appeals acknowledged that *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981), held that an order denying a motion to disqualify opposing counsel was not a collateral order (Pet. App. 7a-8a), but found that this case was "qualitatively different from *Firestone*" (*id.* at 8a). In the court of appeals' view, the district court "did more than simply deny a motion to disqualify counsel," because the district court's order "concern[ed] the secrecy of grand jury proceedings" (*ibid.*). An immediate appeal was therefore necessary, the court stated, to allow petitioners to avoid "losing 'the legal and practical value' of the rights they have asserted" (*ibid.*).

On the merits, the court of appeals agreed with the district court that neither Rule 6(e) nor *Sells* required the disqualification of the attorneys who were involved in an earlier grand jury investigation from a subsequent civil suit involving parties to that investigation (Pet. App. 8a-13a). The assignment of an attorney who had participated in a grand jury investigation to a subsequent civil suit did not amount to a "disclosure" within the meaning of Rule 6(e), the court held, because an attorney's recollection of facts did not constitute a revelation of information to a third party (Pet. App. 11a). That ruling was buttressed, the court stated, by the fact that the two proceedings were "distinct and separate" (*id.* at 12a). Finally, the court of appeals upheld the district court's' finding that the government had not violated Rule 6(e) in this case (Pet. App. 13a).

ARGUMENT

1. There is a dispositive jurisdictional point. A district court order denying a motion to dismiss a complaint is not appealable before the entry of a final judgment. See *Catlin* v. *United States*, 324 U.S. 229, 236 (1945). And a district court order denying a motion to disqualify an opposing counsel in a civil case is neither a "final decision" under 28 U.S.C. 1291 nor an appealable "collateral order" under the doctrine announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981). Accordingly, the district court's order denying petitioners' third and final motion for dismissal of the complaint and disqualification of government counsel cannot be appealed prior to the

entry of a final judgment in this case.[6] The finality requirement of 28 U.S.C. 1291 is jurisdictional, and a court of appeals cannot decide the merits of an appeal over which it lacks jurisdiction. *Flanagan* v. *United States*, 465 U.S. 259, 263, 270 (1984); *Firestone*, 449 U.S. at 379. Therefore, because the court of appeals lacked jurisdiction over petitioners' appeal from the district court's November 6, 1984, order, the questions presented in the petition are not properly before the Court at this time.

The court of appeals distinguished *Firestone* and ruled that the district court's order denying petitioner's third motion was an appealable collateral order (Pet. App. 7a-8a). The court reasoned that the district court's order "concerns the secrecy of grand jury proceedings" and any potential harm to petitioner's "interests which are sought to be protected by keeping grand jury proceedings secret cannot be undone by later reversal of the district court order" (*id.* at 7a). That reason, however, is plainly insufficient to justify the court of appeals' ruling on this issue in this case.

The order denying petitioner's disqualification motion based on an alleged violation of Rule 6(e) is no less interlocutory than the order in *Firestone* where the disqualification motion was based on an alleged violation of the canons of ethics. Neither the strength of a party's claim in a given case,[7] nor the

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[6] Petitioners did not file a notice of appeal from either of the district court's orders denying their two earlier motions, and the time for doing so has now lapsed. In any event, the reasons given in the text why the district court's November 6, 1984, order is not appealable are equally applicable to the court's first two orders.

[7] *Firestone*, 449 U.S. at 378 (citation omitted) ("interlocutory orders are not appealable 'on the mere ground that they

importance of the values underlying that claim,[8] is determinative. Nor would petitioners' claim "perish" if review were postponed until the entry of a final judgment. *Firestone*, 449 U.S. at 377. *Firestone* held that an order denying a disqualification motion is "plainly * * * reviewable on appeal after final judgment" (*ibid.*), because the "plainly adequate" remedy of ordering a new trial is available should the defendants' claim of "injury ultimately prove well founded" (*id.* at 378).

Petitioners have not asserted any interest other than the alleged prejudice to their position in the ongoing civil case. Both the district court and the court of appeals found that there has been no disclosure of grand jury materials to a person who was not already privy to the materials (Pet. App. 13a, 17a, 21a). Petitioners do not challenge these concurrent findings, and, in any event, they do not warrant further review. See, *e.g.*, *Tiffany Fine Arts, Inc.* v.

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may be erroneous' "); see also *e.g.*, *Richardson-Merrell, Inc.* v. *Koller*, No. 84-127 (June 17, 1985), slip op. 14 ("[T]his Court has * * * expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal."); *United States* v. *MacDonald*, 435 U.S. 850, 857-858 n.6 (1978).

[8] See, *e.g.*, *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982) (even in cases involving constitutional claims where "vindication of the defendant's rights requires dismissal of charges altogether, the conditions justifying an interlocutory appeal are not necessarily satisfied"); *Carroll* v. *United States*, 354 U.S. 394, 406 (1957) ("[m]any interlocutory decisions * * * may be of grave importance to a litigant, yet are not amenable to appeal at the time entered"); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940) ("rejection even of a constitutional claim * * * must await * * * conviction before" appellate review is available).

United States, No. 83-1007 (Jan. 9, 1985), slip op. 7-8 n.5; *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982). And both Rule 6(e) itself and the district court's injunction forbid the government attorneys in this case from disclosing any grand jury materials without first obtaining a disclosure order. Thus, petitioners' only claim of injury is that that the government will gain an unfair advantage by relying on attorneys who participated in an earlier, unrelated grand jury investigation. But that concern, should it prove well grounded in fact and law, can be effectively addressed after the entry of a final judgment.[9] In sum, this case is not "qualitatively" different from *Firestone*, and the court of appeals should have dismissed petitioners' appeal.[10]

2. The court of appeals' decision on the merits of the Rule 6(e) question, however, is correct and does

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[9] Indeed, if petitioners prevail at trial, no relief will be necessary. *United States* v. *MacDonald*, 435 U.S. at 859. And if petitioners' claim requires a showing of prejudice, it cannot be addressed before trial. *Richardson-Merrell*, slip op. 13-14; *Flanagan*, 465 U.S. at 268.

[10] The court of appeals did not decide whether it could review petitioners' claim under 28 U.S.C. 1292(a)(1) or by way of mandamus (Pet. App. 7a n.6.) Review under 28 U.S.C. 1292(a)(1), however, would be improper because, as noted above, petitioners' claim may be effectively reviewed after entry of a final judgment. *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978). The incidental "relief" sought by petitioners (*e.g.*, requiring the government to seek a disclosure order or to "purge" its files of grand jury materials) also does not convert a denial of their disqualification motion into an appealable injunctive order reviewable under Section 1292(a)(1). *United States* v. *Ryan*, 402 U.S. 530, 534 (1971). Finally, this case does not present the extraordinary circumstances necessary to justify mandamus. See, *e.g.*, *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976).

not conflict with any decision of this Court or of any other court of appeals.

a. This case involves no use of grand jury materials for any purpose other than responding to petitioners' motions to dismiss and disqualify counsel. It therefore does not present the issue reserved in *Sells* "concerning continued use of grand jury materials, in the civil phase of a dispute," 463 U.S. at 431 n.15, nor does it conflict in any way with the holding in *Sells*.

b. The court of appeals ruled that the assignment of attorneys who had participated in a grand jury proceeding to a later civil case does not in itself constitute "disclosure" of grand jury materials to anyone. That ruling is plainly correct: indeed, the contrary rule would both violate the ordinary use of language and imply the potentially lifelong disqualification of government attorneys who conduct grand jury proceedings from later civil cases involving any of the same entities or the same industry.

c. The court of appeals' decision does not, as petitioners assert (Pet. 12-13), conflict with the Second Circuit's decision in *In re Grand Jury Investigation*, 774 F.2d 34 (1985), cert. granted *sub nom. United States* v. *John Doe I, Inc.*, No. 85-1613 (May 27, 1986). Unlike this case, *John Doe* involved the *use* of grand jury materials in connection with a civil suit. The Eighth Circuit in this case distinguished *John Doe* (Pet. App. 13a n.12), and the Second Circuit expressly declined to address the question decided by the Eighth Circuit in this case. 774 F.2d at 43.

d. There is no need to hold the petition in this case pending the Court's decision in *John Doe*, because the Court's decision there will not affect the judgment in this case. If the Court were to reverse

the Second Circuit's judgment in *John Doe*, the district court's decision in this case should be sustained *a fortiori*. But even if the Court were to affirm the judgment in *John Doe*, the district court's judgment in this case should stand. *John Doe* involves continuing use of grand jury materials in a civil case arising out of a grand jury investigation. This case involves no continuing use of grand jury materials, and the "distinct and separate" (Pet. App. 12a) civil case here arose from facts that occurred after the grand jury investigation was over. The two cases are similar in that neither raises the primary concerns expressed by the Court in *Sells*, the risk of wider disclosure of grand jury materials and the risk of abuse of the grand jury process to generate evidence for use in civil proceedings or to circumvent limits on civil discovery. The district court's refusal to dismiss or disqualify counsel here, however, was plainly correct without regard to the issues raised in *John Doe*.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 85-1840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARCHER-DANIELS-MIDLAND COMPANY
and NABISCO BRANDS, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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June 1986

TABLE OF AUTHORITIES

CASES:	Page
Bast v. *United States*, 542 F.2d 893 (4th Cir. 1976)	2
Catlin v. *United States*, 324 U.S. 229 (1945)	4
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)	3
In re Corrugated Container Antitrust Litigation, 687 F.2d 52 (5th Cir. 1982)	2
Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)	2
Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981)	4
In re Grand Jury Investigation, 774 F.2d 34 (2d Cir. 1985), *cert. granted sub nom. United States* v. *John Doe I, Inc.*, No. 85-1613 (May 27, 1986)	2
In re Judge Elmo B. Hunter's Special Grand Jury, 667 F.2d 724 (8th Cir. 1981)	2
Illinois v. *Abbott & Associates*, 460 U.S. 557 (1983)	2
Illinois v. *F.E. Moran, Inc.*, 740 F.2d 533 (7th Cir. 1984)	2, 3
Socialist Workers Party v. *Grubisic*, 604 F.2d 1005 (7th Cir. 1979)	2, 3
United States v. *Bates*, 627 F.2d 349 (D.C. Cir. 1980)	2
United States v. *B.F. Goodrich Co.*, 619 F.2d 798 (9th Cir. 1980), *aff'd sub nom. Illinois* v. *Abbott & Associates*, 460 U.S. 557 (1983)	2
United States v. *Fischbach & Moore, Inc.*, 776 F.2d 839 (9th Cir. 1985)	2, 3
United States v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983)	7

Table of Authorities Continued

Page

MISCELLANEOUS

The Washington Post, May 28, 1986, p. A16, Col. 3 6

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REPLY BRIEF FOR PETITIONERS

1. The Government invites the Court's attention to the jurisdictional question that appears on the face of the court of appeals' opinion: whether the district court's order was appealable. The Government is wrong when it describes this "jurisdictional point" as "dispositive" (Br. in Opp. 7). The court of appeals was clearly correct when it took jurisdiction of petitioners' appeal pursuant to 28 U.S.C. § 1291. (Pet. App. 6a-8a.) Courts routinely treat as appealable any order of a district court that approves or disapproves

the disclosure of grand jury secrets to or for the benefit of a litigant in a subsequent civil proceeding.[1]

In some cases the issue of disclosure is presented to the court that empaneled the grand jury and is docketed as a proceeding separate from the civil proceeding. The judgment granting or denying access to the grand jury materials is the final decision in that separate proceeding and therefore is obviously appealable. *Illinois* v. *Abbott & Associates*, 460 U.S. 557, 564 n.9 (1983); see also *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 231-33 (1979) (Rehnquist, J., concurring).

In *Illinois* v. *F.E. Moran, Inc.*, 740 F.2d 533 (7th Cir. 1984), Judge Posner saw that a broader principle than merely the separate docketing of the disclosure proceeding was involved in these cases. In *Moran*, the request for disclosure was made to the judge in the civil case, which was pending in the same district in which the grand jury had sat. In concluding that the order to disclose grand jury testimony was appealable, the Seventh Circuit said, among other things, that its conclusion "gains additional support from the

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[1] *See, e.g.*, Illinois v. Abbott & Associates, 460 U.S. 557 (1983); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); In re Grand Jury Investigation, 774 F.2d 34 (2d Cir. 1985), *cert. granted sub nom.* United States v. John Doe I, Inc., No. 85-1613 (May 27, 1986); United States v. Fischbach & Moore, Inc., 776 F.2d 839 (9th Cir. 1985); In re Corrugated Container Antitrust Litigation, 687 F.2d 52 (5th Cir. 1982); In re Judge Elmo B. Hunter's Special Grand Jury, 667 F.2d 724 (8th Cir. 1981); United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980); United States v. B.F. Goodrich Co., 619 F.2d 798 (9th Cir. 1980), *aff'd sub nom.* Illinois v. Abbott & Associates, 460 U.S. 557 (1983); Socialist Workers Party v. Grubisic, 604 F.2d 1005 (7th Cir. 1979); Bast v. United States, 542 F.2d 893 (4th Cir. 1976).

'collateral order' doctrine" of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). 740 F.2d at 536. "Indeed," the court continued, "the conclusion is more candidly based on that doctrine than on the fiction that an order granting a Rule 6(e)(3)(C)(i) petition is a 'final decision' just because it disposes of a separately docketed proceeding." *Id.*

The *Cohen* collateral order rationale fits this case as well as it did the *Moran* case. The reason is, as the court below explained, that "[a]ny harm to [petitioners'] interests which are sought to be protected by keeping grand jury proceedings secret cannot be undone by a later reversal of the district court order" allowing the government lawyers to use their retained (and probably refreshed) memories of the grand jury proceeding in this subsequent civil case. (Pet. App. 7a.) Or, as Judge Posner put it in *Moran*, an order allowing the disclosure of grand jury testimony in this kind of proceeding is immediately appealable as a collateral order because otherwise "there will be no possibility of judicial review of the disclosure of the grand jury testimony before that testimony is disclosed and the harm to the public interest in grand jury secrecy done." 740 F.2d at 537.[2]

The gravamen of petitioners' motions denied by the district court was to exact compliance with Rule 6(e)

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[2] *See also* Socialist Workers Party v. Grubisic, 604 F.2d 1005, 1006-08 (7th Cir. 1979) (order of court in pending civil rights action requiring disclosure of grand jury material appealable under collateral order doctrine); *cf.* United States v. Fischbach & Moore, Inc., 776 F.2d 839, 842 (9th Cir. 1985) (order of grand jury court requiring disclosure of grand jury materials for use in separate civil proceeding appealable under collateral order doctrine).

and to allow the use and consequent disclosure of grand jury secrets only if the procedures of that rule were followed and its substantive standards satisfied. Petitioners asked for dismissal of the complaint without prejudice or for disqualification of the government lawyers only because those seemed in the circumstances the least disruptive but at the same time effective means of enforcing the interest in grand jury secrecy. This Court's decisions that the denial of the usual motion to dismiss for failure to state a claim and the usual lawyer disqualification order are not appealable[3] (Br. in Opp. 7) are therefore not controlling or even especially relevant to the jurisdictional issue.

The Government's "jurisdictional point" is "dispositive" only if one accepts its view of the merits as "dispositive" of what it offers as the nominally separate issue of jurisdiction. If, as petitioners contend, the opportunity that the government lawyers in this case have to use grand jury secrets is disclosure of such secrets within the meaning of Rule 6(e), then this case unquestionably belongs in the category of cases that have uniformly treated disclosure orders as appealable. Moreover, the court of appeals, which disagreed with us on the merits, did not regard its view of the merits as dispositive of jurisdiction. It correctly saw that for jurisdictional purposes this case is properly placed in the category of the disclosure order cases because it implicates the same interests in grand jury secrecy—interests that cannot be vindicated by any subsequent order if the court of appeals

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[3] Catlin v. United States, 324 U.S. 229 (1945); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981).

is wrong on the merits and the district court order does allow unauthorized disclosure.

2. The Court has determined to review, in No. 85-1613, the question whether government lawyers in a civil case who had participated in a grand jury proceeding may have continued access to the documents and transcripts that represent and record what was before the grand jury. The only difference between that case and this one is that here the government lawyers who were in the grand jury proceeding and are now handling the civil case profess to have no intention of referring to grand jury documents or transcripts even though such materials are admittedly relevant to the civil case. That is the ground of distinction that the Government urges. (Br. in Opp. 10-12.) The distinction is dubious factually. (See Pet. 19-20.)[4] More important, the Government itself has correctly argued, when its purpose has thereby been served, that the distinction is not legally significant. It decried the decision of the Second Circuit in No. 85-1613 on the ground that "there is no virtue in requiring an attorney to rely on his possibly inaccurate memory when documents are available." (Pet., No. 85-1613, p. 19.) Thus, if the Eighth Circuit is right that the government lawyer may proceed in the civil litigation with his unrefreshed memory, the Sec-

[4] Both courts below found that the government lawyers handling this civil matter have had access to grand jury materials in their office files, whether because of "questionable storage practices" (Pet. App. 13a) or by design. The grand jury investigation has ended, and the empaneling court has rejected all efforts of private litigants to obtain access to the secret grand jury materials. The only known remaining case in which these materials are relevant is this proceeding.

ond Circuit is wrong since there is "no virtue" in denying him access to the documents by which his memory could be refreshed.

The thinness or nonexistence of the distinction between memory refreshed and memory unrefreshed as a threat to the divulgence of data that society has an interest in keeping secret was dramatically illustrated just lately on the first day of the espionage trial of Ronald Pelton. In his opening remarks the prosecutor told the jury that Pelton, who apparently had an extraordinary ability to recall technical information, "didn't go home with stacks of classified documents—what he had was in his head." And what the Soviets got from him was what was in his head. *The Washington Post*, May 28, 1986, p. A16, col. 3.

The Government is wrong on two counts in asserting that reversal of the Eighth Circuit's judgment in this case would "imply the potentially lifelong disqualification of government attorneys who conduct grand jury proceedings from later civil cases involving any of the same entities or the same industry." (Br. in Opp. 11.) The rule for which petitioners contend would have no such dire consequence. What is involved here is not just any grand jury proceeding involving petitioners and an industry of which they were both members but a recent such proceeding that developed data of undoubted relevance to the later civil case. And the grand jury lawyer is not disqualified even in those limited circumstances if the standard of "particularized need" for access to grand jury materials under Rule 6(e)(3)(C)(i) can be satisfied. This Court has pointed out that the standard is "highly flexible" and does not woodenly pretend that government lawyers are just the same as private lawyers.

United States v. *Sells Engineering, Inc.*, 463 U.S. 418, 445 (1983).

CONCLUSION

For the reasons stated in the petition and in this reply brief the petition should be granted and the case heard in tandem with No. 85-1613. The questions presented in the two cases, if not precisely the same, are closely similar. For the Court to have this case before it will improve its perspective on the broad issue left by *Sells* that it has undertaken to resolve. There need be no concern that the Court would be diverted from the merits in this case by the jurisdictional issue. The Government argues that the district court's decision, which upholds the opportunity of the government lawyers to use in this civil case their retained knowledge of grand jury secrets and to have continued access to grand jury documents in their office files, was not appealable. The argument assumes the Government's view of the merits, *i.e.*, that the opportunity for such use and access does not amount to a disclosure within the meaning of Rule 6(e). That is the very question that the Court is asked to decide.

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